MODERN BUSINESS COMMERCIAL
LAW LIBRARY

Modern Business Commercial Law Library

VOLUME III

The Law of Contracts

including the Consideration for them; Assent; Statute of Frauds; Payment; Interest; Damages for Non Fulfillment; Contract of Agency; of Sale; of Common Carrier; Telegraph; Telephone; Promissory Notes; Bills of Exchange; Bank Checks; Guaranty and Surety; Partnership.

By

ALBERT S. BOLLES, Ph.D., LL. D.

Formerly Professor of Mercantile Law and Banking in the University of Pennsylvania, also lecturer in the same subjects in Haverford College

P. F. COLLIER & SON CORPORATION

NEW YORK

Copyright, 1930, by
Doubleday, Doran & Company, Inc.

Copyright, 1905, 1911, 1918, 1920, 1922, by
Doubleday, Page & Company

ALL RIGHTS RESERVED

PRINTED IN THE UNITED STATES
AT
THE COUNTRY LIFE PRESS, GARDEN CITY, N. Y.

CONTENTS

CHAPTER		PAGE
X.	Contracts (continued)	453
	3. Consideration	453
	4. Assent	466
	5. Written Contracts and the Statute of Frauds	478
	6. Payment	487
	7. Interest	496
	8. Damages for Non-fulfilment of Contracts	502
XI.	Contract of Agency	514
XII.	Contract of Sale	538
XIII.	Warranty	560
XIV.	Common Carrier; Telegraph; Telephone	571
XV.	Promissory Notes and Bills of Exchange	594
XVI.	Bank Checks	628
XVII.	Guaranty and Surety	640
XVIII.	Partnership	648

MODERN BUSINESS COMMERCIAL
LAW LIBRARY

CHAPTER X

CONTRACTS (*Continued*)

§ 3. Consideration

1. There must be a cause or consideration for a contract.
2. Meaning of consideration.
3. A consideration need not be adequate.
4. A promise to pay another's debt without consideration is invalid.
5. An agreement to accept part of a debt for the whole is void.
6. Mutual fraud is a consideration.
7. An illegal consideration cannot sustain a contract.
8. The legal part of a divisible consideration can be enforced.
9. The compromise of a criminal charge is not a valid consideration.
10. Work or service is a consideration for a promise to pay for it.
11. The worth of a part of an agreed service can be recovered.
12. There can be no recovery for a voluntary service.
13. A promise is a good cause or consideration for a promise.

14. A contract which cannot possibly be performed cannot be enforced.
15. A contract resting on a consideration that has wholly failed cannot be enforced.
16. Illustration of the principle.
17. The consideration for changes in building contracts.
18. Though a consideration be needed, proof may sometimes be omitted.
19. When a moral obligation to pay is sufficient.
20. A contract may be modified without a new consideration.

1. THERE must be a cause or consideration for every contract. In other words, the law will not regard a person as having made a promise without a cause or consideration. A promise is not made for nothing. A negotiation or undertaking without a consideration is a naked bargain; and the promisor, even though admitting his promise, is under no legal requirement to perform it. In no case can a person be required to fulfil a promise or contract that is not based on a consideration.

2. The word consideration has a peculiar meaning. It denotes some substantial cause for the promise. This cause may be one of two things—i. e., either a benefit to the promisor or an injury or loss to the promisee in consequence of the promisor's conduct or request. Thus, if A simply promises B to pay him a thousand dollars in three months, the promise is worthless in law, even if in writing, for the promise is merely voluntary and is without any consderation.

Why should A make such a promise; what does he get for it? Nothing. As nothing is received or expected, the law protects him—even though he is so foolish as to make such a promise—against B's atempt to enforce it. But a very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to sustain a contract.

To the above definition a fuller one may be given. Says Lawson: "A consideration which will support a simple contract is some right, interest, profit, or benefit, accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other."

3. A consideration need not be adequate. A court will not inquire into the exact proportion between the value of a consideration and that of the thing to be done or given in exchange. But it must have some real value, and, though this be very small, this circumstance may, even by itself, and still more when strengthened by other facts, imply or sustain a charge of fraud. Again, courts will sometimes not require the fulfilment of contracts that are without fraud, and will give only reasonable damages to the person who seeks compensation from the other in consequence of his failure to execute his undertaking.

Anson has presented forcefully another view of consideration worthy of notice. It is *evidence* of a contract. From this point of view adequacy plays a subordinate part.

4. The way is now prepared for inquiring what classes of contracts rest on a valid consideration. As

a voluntary undertaking for which no consideration is to be received cannot be enforced, sc, a promise to pay, without consideration, the debt of another is of this character, and void. A promissory note, therefore, given by a widow for a sum due to her husband's creditor, is without consideration and cannot be recovered. Why should she pay it? She has received nothing.

5. An agreement without consideration between a debtor and a creditor to accept at a future time, a part of a debt for the whole, is void. Of course, an actual acceptance of a part of the money due from a debtor in discharge of the whole amount, would be a lawful and binding transaction. But an agreement to accept at a future time, a part for the whole is of a different character. Why should the creditor give up a portion of his debt for nothing? To this rule there are many exceptions; for example, when the amount of the claim is disputed, or where mutual unsettled demands exist, or when the creditor receives some new benefit or advantage. A promise to accept less than the full amount of a doubtful claim is always valid.

An illustration of practical value may be added. A sued B and C. Before the trial of the case A released C in writing in these words: "I hereby release C from all individual liability for the claim upon which the suit against B and C is based, so that, if I fail in recovering judgment against B, C is released from all liability." A failed to recover against B, and then brought a suit against C, who interposed this release

as a defense. It was ineffectual because it had been made without any consideration.[1]

6. A note procured by fraud is generally worthless, and the door of justice is shut against its collection; but the mutual fraud of the parties to a note is a binding consideration. Says an eminent jurist: "It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them." Thus, A, who feared bankruptcy, for the purpose of defrauding his creditors, gave his property to his brother B, taking four notes from him. As the transaction was a mutual fraud, B could not have escaped had A demanded the payment of either of the notes. As B could not set up his own fraud as a defense against the person to whom they were payable, neither could he make this defense against a bank that had taken one of them as security for a debt.

7. The law will not sustain a contract founded on an illegal consideration, for such a consideration enters directly into the instrument and destroys its validity, because the law will not permit itself to be violated with impunity. For this reason a promisory note given in a gambling transaction in a state where gaming is a statutory offense is void, though it is negotiable in form and is transferred to an innocent holder or owner, who has given therefor value or money. Were such a note collectible by a third party the law which declares all gambling transactions void could be defeated. For the same reason a promissory note given to a broker to cover losses incurred in a stock-gambling

[1] If A had added a seal to his signature the writing would have been effective.

transaction is void in all the states where such a contract is regarded as a wager.[1]

8. If the consideration for a contract is partly legal and partly illegal, and no separation of the parts can be made, there can be no recovery of any part; but, if there are several distinct considerations, some of which are legal and some not, the legal portion may be recovered. Thus, no one could once recover in Pennsylvania on a note given for a tavern reckoning exceeding twenty shillings, but if other legal items of account entered into the consideration these might be the subject of a legal recovery.[2]

9. In compromises the rule most applicable to them has been thus stated by Elliott: "The compromise of a claim which is asserted in good faith and of the validity of which the parties at the time entertain a doubt, and about which there is a bona fide controversy, is a valuable consideration and will support a promise or a contract."

But the compromise of a criminal charge of a public nature is not a valid consideration for a contract. As an eminent English judge long ago remarked: "You shall not stipulate for iniquity." The reason is clearly one of public policy. Such a compromise ought never to be made, but often is for the sake of recovering a part of the loss. Not infrequently a thief makes such a compromise, agreeing to return a part of the money, or the thing he has taken, provided that no prosecution shall be begun against him. The law is

[1] Harper v. Young, 112 Pa., 413; Unger v. Boas, 13 Pa., 601; Daniel on Neg. Instruments, § 806-808, p. 804 (Fifth Edition).
[2] Yundt v. Roberts, 5 Serg. & Rawle, 138.

less strict on this subject than formerly and to some extent has been changed by statute.[1] For example, a note given in settlement of a criminal prosecution for obtaining money or goods by false pretenses may now, by statute,[2] be enforced. But the promise of a payee of a note to prosecute the makers for forgery is illegal, and cannot be enforced. As forgery is condemned by statute, and as the crime cannot be compromised, a note founded on a compromise of the unlawful act is invalid.

10. Any work or service rendered to, or for, a person on his request is a good consideration for a promise to pay for it. If no promise is made the law will imply one. In other words, it presumes that he has made such a promise, and will not permit him to enter a denial. The same rule applies to the payment for goods or property of any kind delivered to anyone by his request.

Damages, liabilities or obligations arising from the promise of another are sufficient considerations for such promise although no actual benefit accrues to the promisor. Thus if a gift is promised and, relying on the promise, the promisee incurs a liability, the gift will be upheld.

The privilege of naming a child is a valid consideration for a promise. Thus an old grandfather who promised to leave a legacy to his grandchild if he could

[1] Such a contract "is to tempt a man to transgress the law and to do that which is injurious to the community." Collins v. Blantern, 3 Wilson, 350. Of course such an agreement must be worthless, because the prosecution of criminals is the work of the state. Nevertheless, a corporation or other defrauded party may, by withholding evidence of the criminal's guilt, prevent, in fact, the state from obtaining a conviction.

[2] In Pennsylvania.

be permitted to change her name from Catherine to Harriet, forgot to give her the promised legacy in his will. But the court sustained and enforced the promise.

11. Again, should A agree with B to work for him for a specified period, and, after working awhile, leave without good cause, can A recover anything for the service rendered? In some states A can recover what his service is worth, B having a right to set off or deduct the amount of any loss or damage he may have sustained; in other states A can recover nothing. Wherever A can recover anything this is not by virtue of his contract, for the reason that, having broken it, he cannot ask the court to enforce it. He recovers, if at all, on the ground of an implied contract; in other words, the law enables him to recover, after due consideration of all the facts, the worth of his service, whatever it may be, for the reason that it is just for him to receive so much.

12. No person can make another his debtor against his will by a voluntary offer of work, or money, or goods; but when such an offer is accepted and the work, merchandise, or other thing is retained, the law generally will imply or presume that it was offered by the other party's request, and will imply his promise to pay therefor. Consequently, the law will require the promisor to fulfil his promise, unless it can be shown that the thing was a mere gift.

13. A promise is a good cause or consideration for a promise, and this frequently occurs. For example, a promise to accept goods and pay for them is a good

consideration for a promise to deliver them. An illustration of this principle is an agreement by creditors with their debtors, whereby they are to receive a sum or dividend, or other thing, in discharge of their indebtedness. Such agreements are often called compositions. Usually, a fixed payment, or several payments, are to be secured to each creditor in proportion to the debtor's assets. In such a case each creditor signs the agreement, and the promise of the one is valid or binding on each and all of the others.

This principle, that a promise is a good consideration for a promise, has sometimes been applied to subscription papers, the promise of each subscriber forming a good consideration for the promises of the rest. As the doubt concerning the liability of the subscribers is the want of a consideration, it may be remedied by affixing a seal to each name, or by affixing a seal which is declared in the instrument to be the seal of each one.[1]

While voluntary subscriptions, regarded alone and unsupported by anything, cannot be collected, the necessary consideration is usually found in the expenditure of money, doing work, or incurring some liability by the proimsee on the faith of the subscription. But if these things have been done prior to the subscription, it cannot be collected.

In the way of more specific principles (1) the act of one who subscribes to the shares of a contemplated corporation is a mere proposition or offer which may be withdraw any time before the organisation. (2)

[1] For forms of subscription see Vol. VI, Appendix, No. 8.

After the organisation is completed he is bound by virtue of the charter or statute authorising the corporation. Says Morawetz: "The validity of a subscription for shares depends upon the charter or statute under which it is made; and, if the terms of the statute have been complied with, the subscription will be binding, although it will not be binding considered as a common law contract by reason of the absence of a legal consideration." (3) One who subscribes to raise a fund for charity, education, an improvement, and the like, may withdraw unless some act has been done in reliance thereon, like the purchase of land. (4) If such an act has not been done a subscriber is not bound, even though the terms of the subscription be complete, as the raising of a specified sum of money for a college. (5) Death before such an act is done operates as a revocation, and the subscriber's estate is not bound.

14. No contract or promise can be enforced by a person who knew that its performance was wholly impossible. But he cannot defend himself by showing that the performance of his promise was impossible whenever by his own fault, or by his own personal misfortune, it cannot be executed. There are, however, promises or contracts which, from their nature, must be construed as if the promisor had said, "I will do so and so if I can." For example, should A promise to work for B for one year at twenty dollars a month, and, at the end of six months, be disabled by sickness, B cannot compel him to fulfil the contract, and A can recover his reward for the time spent in

B's service. A mere want of money is not regarded by the law as a legal impossibility.

15. Lastly may be considered contracts in which there is a failure of consideration. If a consideration is given, apparently valuable and sufficient, but proven to be worthless before the contract is properly performed on the other side, the law does not require anything more to be done. Money paid on such a contract can be recovered (though without any increase or addition) as a compensation for the other's loss and disappointment. A consideration that has partly failed, but leaves a substantial, though much less valuable, consideration remaining, is a sufficient foundation for requiring the other party to fulfil his promise. He may then be sued on his promise, but is entitled by dededuction, set-off, or in some way to an allowance or indemnity for whatever loss he may have suffered in consequence of the partial failure of the consideration.

16. Another illustration of the failure of consideration may be given. A agreed to deliver to B some machinery, and took notes in payment. At the same time it was agreed that the ownership of the machinery should remain with the seller until the notes were paid. Before the time for paying them arrived the machinery was destroyed by fire. As the consideration for the notes had failed before their payment, the maker was no longer liable.

17. Another application of this principle may be mentioned. A difference sometimes arises when A undertakes to do something for B, for which A is to be paid a specified price. In executing the under-

taking A departs materially from B's direction. What are the rights of the parties? This question arises most frequently in building contracts, in which there is often some departure from the original undertaking. If B assents to the alteration he is bound as strongly as he would have been by the original contract. He may assent openly, by word or in writing, or by seeing the work done and approving it, or by silence, for silence in such circumstances would generally be equivalent to an approval. But, if the change were one that B had a right, either from the nature of the change, or from A's language concerning it, to suppose would add nothing to the cost, then no promise to pay an increased price would be inferred from either an express or open approval. Generally, if A does or makes what B did not order or request, he can refuse to accept it, but when B does accept he must pay therefor. For example, should A choose to add something to B's house without his request, or make some alteration therein, B may retain the thing and yet not be liable to pay therefor, and A has no right to take it away unless he can do so without injury to the house. This rule would apply whether the addition or alteration was large or small. Building contracts sometimes provide that B shall not pay for any alteration or addition unless it has been previously ordered in writing. Without such a provision B would be liable for any alteration he ordered, or voluntarily accepted after its completion. It is also sometimes agreed that, for any additions or alterations, the same rate shall be paid as for other work. The remark may

be made that the law would imply an agreement of this character if it were not made by the parties themselves.[1]

18. Though a consideration is always required, in some cases the proof that one was given may be omitted on trial. The most common case is a promise in writing wherein a seal is added to the promisor's name. No consideration need be proved, because the law presumes there was one. Suppose that two writings are similar in form; one is sealed, the other is not. The law supposes or assumes that a sealed instrument is drawn with care, is of more solemn character than an unsealed one. The law, therefore, assumes or implies that there was a consideration in the one case, while in the other it must be proved.

There are many principles of the law founded on reasons that grew out of conditions or circumstances that no longer exist. In the olden time, when people could not write their names perhaps, much less deeds and other papers, they used seals as proofs of their signatures. Every person had a seal of his own, and, whenever he used it, the writing was regarded as important; and in its preparation all the formalities were remembered, and especially the cause or consideration. Consequently, the law did not require any proof of a consideration in such cases. In modern times, while many an unsealed instrument is drawn with just as much care, and a seal conveys no special or distinctive mark or characteristic, as almost all seals are alike, nevertheless a different rule of proof applies to sealed, from that applied to unsealed, instruments.

[1] *For forms of building contract see Vol. VI, Appendix, No. 10.*

19. A moral obligation to pay money is a good consideration for a promise to do so, whenever there was, in the beginning, an obligation to pay. Thus, the subsequent promise of one who has borrowed money of another and given his note therefor, which by lapse of time has ceased to be binding, can be enforced because there was a good consideration for the first or original promise; namely, the money received from the lender.

20. A contract may be modified by mutual agreement without a new consideration. Says the court in a case calling for the application of this principle: "The consideration for the original agreement is imported into the new agreement, which is substituted for it. No good reason is perceived why the same principle does not apply to the recision of a contract."

§ 4. Assent

1. Parties to a contract must agree to the same thing in the same sense.
2. When the assent must be given.
3. Effect of accepting an offer on a condition.
4. Assent may be inferred from circumstances.
5. Assent is a question of fact.
6. An accepted proposition that is to be put into writing is usually not binding.
7. When assent has been given the contract cannot be altered without another assent.
8. Offers on time.
9. How long may an offer continue?

10. A consideration is not required to sustain an offer.
11. An offer for a fixed time may be recalled.
12. Illustrations of this principle.
13. If no time is fixed the law presumes a reasonable time.
14. Offers and replies by correspondence.
15. An illustration of a bargain by correspondence.
16. An offer cannot be turned into an acceptance.
17. Rewards.
18. A contract is binding from date of accepting offer.
19. A contract may be made by telephone.

1. To make a contract the parties thereto must agree to the same thing in the same sense. If this be not done the contract is not complete. Thus, on one occasion, a person offered to sell to another by letter a quantity of "good barley" at a specified price. The other replied, "We accept your offer, expecting you will give us fine barley and full weight." As the barley was not delivered, the buyer sued for the injury or loss he had suffered. On the trial of the case the evidence showed that the terms "good" and "fine" were well known in the trade, and meant different qualities of barley, and that there was not an acceptance of the offer of good barley. Consequently, nothing could be recovered. Again, a person sent an order to a merchant for a quantity of goods on well-defined terms of credit, and the merchant sent a smaller quantity on a shorter term of credit. The goods were lost by the way, and the sender having sued to recover for the amount, it was decided that he must bear the loss, as

there was no sale or contract between the parties.

2. Usually the assent must be given at the time of making the offer. In many negotiations an agreement is immediately completed; or, if it is not, then both parties understand that the negotiations are at an end.

3. Again, a person who receives the proposition or offer, and accepts it on any condition or with any change of terms, does not complete the contract unless the party who made the offer assents to the modification. For example, in the case of a party who offers to buy goods at a named price, and specifies the mode of sending them, which is accepted, and the goods are sent as directed, and are lost on the way, the buyer is the loser, because the goods were his by the sale. which was completed by the acceptance of the offer. But a seller who should accept the offer, and in his acceptance make some modification of the terms, and then send the goods would be the loser, should they be lost, because the contract of sale was not completed.

4. Sometimes assent may be inferred from circumstances. Thus, a contract in writing may be good though signed by one only, for the assent of the other may be inferred from his possession of the paper and other circumstances. Another illustration may be added —the placard of rules posted in factories for operatives. These are regarded as agreements or contracts with them, and may be enforced. Of course, an operative in a mill is not bound unless he knew of them; but, when knowledge is proved, he is as clearly bound as he would have been by putting them into his hand at the time of employing him. Another example may

be given. A son was taken sick, and his father declared that whoever would take care of him should be well paid. This offer was made known to a person who was then attending him, and who continued his service, and after awhile demanded payment from the father. By thus caring for him the nurse was regarded as accepting the offer. Compliance with the proposition, especially when no notice of acceptance is required, is the most significant evidence of acceptance.

A voluntary compliance with the terms of an offer by one who had previously declined them would render the acceptor liable.

5. These illustrations are sufficient to show the nature of the principle of assent to a contract. They also clearly show that this is a question of fact that must be determined in each case. Have the parties assented or come together? In other words, have their minds met and thus completed their negotiation? If they have, then the law regards the assent as complete; otherwise, no contract has been made.

6. Another important principle is that a proposition immediately accepted, but which is to be put into writing, is usually not binding. Thus, on one occasion A met B accidentally, and said to him that he could sell coal as cheaply in Cincinnati as at Pittsburgh. B replied, saying that he would take a quantity at Cincinnati at a specified price, which was also the Pittsburgh price. A also said he must be paid in cash, and have security for the return of the barges that were to convey the coal. B replied, "Certainly," and prepared

a memorandum of the agreement and drew his check to A for the price of the coal. A said, "I will have the papers drawn to-morrow." B called on A the next day, a dispute arose, the agreement was not put in writing, and nothing further was done. The contract was regarded as not completed.

7. For the same reason, that when assent has been given to the terms proposed the contract is completed, they cannot be altered without another assent. In others words, a contract cannot be altered by the simple act of one party. There must be a second meeting of minds to change its terms. Thus, A agreed by written contract to carry coal for B from one place to another. B afterward wrote to A, proposing alterations in the quantities that were to be carried, to which A did not reply. The contract remained unaltered.

8. We shall next describe offers made on time. Strictly speaking, every offer is of this character, but, in the large number of transactions, the offer and the assent or dissent are nearly at the same time. If one says, "I will send you this thing for a specified price," and the other answers, "I will take it," the assent is complete, and the contract is fully formed. But the answer follows the offer, and it cannot be actually at the same time. The offer, however, is regarded as continuing until the acceptance, if this is done at once. Though the party addressed pauses a moment or two to think about the offer, still his assent makes a contract, for the offer continues until it is withdrawn. How long does the offer continue? The answer is, a reasonable time; and what this is must depend on

the facts in each case. If the party addressed goes away and does not return for several days, and then says he will accept the offer, he is too late, unless the proposer, in his turn, assents. So he would be, probably, if he came the next day, or even the next hour.

"An offer without more," says Justice Mitchell, "is an offer in the present to be accepted or refused when made. There is no time which a jury may consider reasonable or otherwise for the other party to consider it, except by the agreement or concession of the party making it. Until it is accepted it may be withdrawn, though that be at the next instant after it is made, and a subsequent acceptance will be of no avail."

9. What is a reasonable time depends on the nature of the proposal and the situation of the parties. Oral evidence of known facts may be admitted to assist in determining what would be a reasonable time; but when a written proposition is to be accepted within a reasonable time oral evidence is not admissible to show that the parties agreed that the proposal should remain open for any specified time.

An acceptance of an offer to sell real estate five days afterward was held to be within a reasonable time.

The person making the offer may say how long the offer shall continue. He may say to the other, "I will give you an hour, or a day, or a week to make up your mind." Then the person to whom the offer is made knows the duration of the offer. He may avail himself of the specified period for making inquiry, and

if, within the time fixed, he expresses his assent, the contract is completed as effectually as if he had answered as soon as the offer was made.

10. It has sometimes been said that the person making the offer cannot be bound whenever the assent has been delayed, even though a fixed time was given to the other, because there is no cause or consideration for continuing the offer. But, as an eminent law-writer has remarked, if one who makes an offer that is instantly accepted is not bound because there is no consideration, then it might be said that he would not be bound by an answer made within a specified time. No one doubts that an offerer is bound by an immediate acceptance, though he receives no consideration therefor. If this be true why does not the same principle apply to an acceptance that follows an offer in a second, or a minute or two, or even a longer period, not passing beyond a reasonable time or a time mentioned by the proposer himself?

11. However, an offerer who states a specified time for acceptance without a cause or consideration may, at any time before his offer has been accepted, recall it, and he may do this even if he gives no time. And, if he makes an offer that is instantly recalled, it cannot be accepted by the other party whatever may have been his intentions.

12. Two or three illustrations may be given. In one of them a person was appointed an agent of a fire insurance company, with authority to take applications for insurance. An offer for insurance was made to a person, but was not accepted for nearly six months.

This was deemed too late. Undue delay in accepting an offer may be, and should be, treated as a refusal, and the proposer is not bound by a tardy acceptance. A proposal by letter remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attended to the matter with reasonable diligence. In another case, B having agreed to build a house for A, made a contract with C for the materials. As A owed money to B on account of the contract, he wrote a letter to C, saying, "If B gives you an order on me for the bill of materials I will accept it and pay it." C took no action concerning the letter for more than two weeks and then he wrote a reply to A, reminding him of the fact that he had sent a letter indicating his willingness to accept an order for the materials he had furnished. At that time A had paid to B the full amount of his indebtedness to him. Two months afterward B gave C an order on A for the price of the materials. The delay was too great in acting on this order to make A liable for the amount. Surely C had no reason to suppose after such a long delay that A's offer was still open for acceptance. Most offers, as we shall shortly see, are for very brief periods of time, or for an immediate acceptance or refusal, and A doubtless supposed that, if C did not choose at once to accept his offer to pay the bill for the materials, or to become responsible for them, he expected to look to the buyer for his purchase money. Great confusion would indeed be wrought if, after making an offer of this kind, and delaying two or

three weeks, or perhaps longer, an acceptance could be sent binding the person who made the offer.

One other illustration may be given. A railroad company desired to buy some land, and the owner stated in a letter that he would sell if his offer were accepted within thirty days. After twenty-five days the railroad company accepted the terms. The owner then declined to let the company have the land, having made up his mind that it was worth more. He maintained that he had a right to withdraw the offer because nothing had been paid to him for the delay, but the court decided that his offer continued through the specified period unless it was withdrawn. Had the owner done this the railroad company could not afterward have accepted his offer. But, after the offer had been accepted, the minds of the two parties had met, the contract was complete, and no withdrawal could be made.

13. If the proposer fixes a time, or expresses his intention, then the other party knows exactly what it is. If no definite time is stated then the inquiry concerning a reasonable time is one of fact that ordinarily must be decided by a jury.

In applying this principle to subscriptions, how long is a person bound by a promise contained in a subscription? If no time is fixed and there is no express withdrawal, the court will look into all the circumstances, and inquire what the parties actually understood or intended, and endeavour to carry this intention into effect.

14. Lastly, may be considered offers and replies by

correspondence. Many contracts are made in this manner, either by letter or by telegram. At what time, or by what act, is such a contract completed? If A writes to B making an offer, this is regarded as continuing until it reaches B and during a reasonable time thereafter for accepting it. It may, however, be withdrawn by A at any time before acceptance, but is not withdrawn in law until a notice of withdrawal reaches B. Thus, should A in Philadelphia write to B in New Orleans, offering him a certain price for one hundred bales of cotton, and the next day alter his mind, and write to B withdrawing his offer, and the first letter should be received before the second, B has the right to accept the offer and by his acceptance bind A. Should B delay to accept until the receipt of the second letter, A's offer would then be effectually withdrawn. It is a sufficient acceptance if B writes to A to this effect, and puts his letter into the post-office. The minds of the two parties have met as perfectly as if the acceptor had put his answer into the hand of a messenger sent by the offerer himself. The contract is properly held to be complete when the acceptor has mailed his letter of acceptance, for another reason, namely, the offerer contemplated and implied that the acceptor would manifest his intention in this manner. Offers by letter can be withdrawn or set aside by the quicker action of the telegraph. Thus, in the case just mentioned, should A, sending his first letter, telegraph a withdrawal of his offer to B, which reaches him before his written offer, his withdrawal would be effectual. But, if an offeree should accept and mail his offer, he

could not revoke it by a subsequent telegram saying that he declines the offer, even though this should reach the other party before the letter of acceptance. Sometimes the case has been put of an offer sent by letter in a sailing ship, and a withdrawal sent later in a steamer that has arrived first. In such a case the withdrawal would be effectual. One can readily imagine cases in which, perhaps, parties who were dishonest would deny receiving first the information sent last, but probably in most of them it would not be difficult to trace the sending of a telegram, the time it was received at the other place, its delivery, etc., to the party for whom it was intended.

Though the postoffice is usually the agent of the sender of a letter, in the case of an offerer the postoffice is his agent or servant both in sending his offer and receiving his reply.[1] Consequently, an acceptance is binding as soon as the letter is delivered to the postoffice.

15. An illustration of a bargain by correspondence may be added. It related to the purchase of iron. A wrote to B, "We will take one hundred tons. delivered [at a place mentioned] as early in the spring as the navigation will admit," and a further quantity at any time between two dates that were mentioned. To this B replied in a few days: "We will have no metal to deliver after the spring freshet, or, in case of no freshet in the river, in the canal immediately after. Therefore, it will be necessary for you to say what

[1] The rule is otherwise in Massachusetts. In Massachusetts an acceptance by letter or telegram is not complete until it reaches the offerer. This rule prevails only in that state.

quantity you will take on spring delivery." An immediate answer was requested. In answer to this, A wrote that he would take a specified quantity if delivered in a way described, or one hundred and fifty tons if delivered in another way. To this letter no answer was given, and A tried to recover damages for the non-delivery of the one hundred and fifty tons. This was a request for a definite order, but the court decided that the contract was not complete without a further reply from B. The court declared that the last letter did not complete the transaction. It suggested a new proposal, and required another communication to complete it. It might not have suited B to furnish one hundred and fifty tons in the spring, and no one but himself could say that it would. He had not said so; he had left A's letter unanswered, and the transaction therefore was unfinished.

16. A person who makes an offer cannot turn it into an acceptance. Thus, a sly old uncle offered by letter to buy his nephew's horse for thirty dollars, and added, "If I hear no more about the matter, I consider the horse is mine." No answer was received; nevertheless there was no meeting of minds and no contract, for only one mind had been active.

17. Offers or rewards are often made by advertisement and, when accepted, are usually binding. Thus, the owners of a cure-all medicine—a carbolic smoke-ball—offered to pay £20 to any person who contracted influenza after having used one of their smoke-balls in a specified manner. A person followed the directions, and, failing to receive the benefit expected, sued

for the offer and recovered. A case worth noting has been decided in Illinois. A person offered the following reward: "Harness stolen! Owner offers $100 to anyone who will find the thief, and another $100 to prosecute him." Stimulated by the reward, the thief was caught and prosecuted, and the reward was claimed. This demand for the money cooled down the offerer immediately, and he resisted payment, and, forsooth! escaped, the court declaring that his advertisement was not an offer to pay a reward, but an explosion of wrath.[1]

18. A contract dates from the acceptance, and not from the time of the offer, and is regarded as made at the place of acceptance, and, therefore, construed or interpreted by the law of that place. But if it is to be performed at another place, usually it is interpreted by the law of the place of performance.

19. Contracts may be consummated by telephonic conversation, as effectively as if the parties were standing face to face. Likewise a phonograph may be the means through which an offer may be made and its acceptance recorded.

§ 5. Written Contracts and the Statute of Frauds

1. Some contracts must be in writing to comply with the statute of frauds.

[1] A man's house was burning, and he offered to give $5,000 to anyone who would bring the body of his wife out of the building, "dead or alive." She was rescued, and the reward was demanded. He was obliged to pay. He was not permitted to defend on the ground that his words were merely an explosion of affection. It is difficult to distinguish between the two cases.

2. The more important sections of the statute.
3. A promise by an executor or administrator.
4. A promise to pay the debt of another.
5. Agreement in consideration of marriage.
6. Agreement not to be performed within a year.
7. Agreement concerning the sale of land.
8. Nature of the writing required to satisfy the statute.
9. The sale of goods.
10. Application of the statute to a contract for the manufacture of an article.
11. The statute does not apply to executed contracts.

1. The law requires some contracts to be in writing. A statute relating to the subject was passed during the reign of Charles II. (1677), requiring this to be done for the purpose of preventing frauds and perjuries. It was supposed that a law requiring contracts to be put in writing and signed by the person who was to pay for the thing purchased, or to do the thing promised, would lessen fraudulent practices. Yet it has been remarked by those who understand the history of this statute that, whatever may have been the intention of its authors, it has been the means of enabling persons to injure others in the way of opening a most convenient door for not fulfilling contracts which were honestly made, but which they did not wish to execute. Many a contract made in good faith has not been enforced, because the breaker did not comply with the law, by putting it in writing and signing his name thereto. This statute shows how

very slowly the people learn the laws; for, though it was re-enacted in this country in the early times, yet there are many to-day who are not familiar with it, and consequently do not observe it.

2. This statute has been enacted in nearly every state in the Union, with some changes. The principal provisions of the English statute re-enacted in this country, and to be considered here, are the fourth and seventeenth sections. The former provides that no executor or administrator shall be personally liable on any promise that he may have made; nor any person on a promise for the debt or default or miscarriage of another; nor shall any person be liable on an agreement made in consideration of marriage; nor shall any contract or agreement for the sale of lands or leasing of them that is not to be performed within one year from the time of making it, be valid, unless the agreement, or some memorandum or note of it, is in writing and signed by the party who is charged as having made it, or some other person lawfully authorised by him to sign the same.

The seventeenth section provides that no contract for the sale of any goods, wares or merchandise for the sum of fifty dollars, or more, shall be good, unless the buyer has accepted part of the goods thus sold and actually received them, or given something in the shape of earnest to bind the bargain, or in part payment or unless there shall be some note or memorandum in writing of the bargain made and signed by the parties to the contract or their agents.

3. The first clause relates to the promise of an

executor or administrator. The duty of these persons, as is well known, is to settle estates. The law does not make them personally liable for any contracts made by them. They can, indeed, make contracts for which the estates they represent may be liable, but personally they are free.

4. The next provision relates to promises to pay the debt of another. This provision has often been difficult to enforce. A person, of course, is liable on his own promise to pay for whatever he may purchase, but is he liable to pay for the debt, or default of another, unless there be an agreement in writing, as the statute requires? In such a case is the promise to pay one's own debt, or to pay the debt of another? One may think that this question can be easily answered, but, in truth, it is often very difficult to answer. For example, if two persons go to a shop and one buys and the other, in order to give credit, promises the seller, "If he does not pay you, I will," this is a promise to pay the debt of another, and is void unless it is in writing and signed by the promisor. But if he says, "Let him have the goods, I will be your paymaster," this is an undertaking for himself, and the law regards him as the actual buyer and the other only as his servant. Again, if B furnishes goods to C on A's express promise to pay for them, saying to B, "Let C have goods to such an amount, and I will pay you," the credit is given to A, and in that case C is not liable for them and A is the immediate debtor. The undertaking is said to be original with him and not a collateral one;

therefore, it need not be put in writing. Whether a promise is an original one to pay one's own debt, or a collateral promise to pay the debt of another, is a question of fact to be determined in each case. The cases calling for this application of the statute are numerous.

Whenever the main purpose and object of the promisor is not to be responsible for the debt of another, but to serve some purpose of his own, his promise is not within the intent of the statute, although in form it may be a promise to pay the debt of another. If there be coupled an oral promise to pay the debt of another and also to do some other thing, the latter thing can be enforced at law, but not the promise to pay the debt.

5. The clause relative to agreements made in consideration of marriage requires brief explanation. The promise to marry is not within the statute, but all promises in the nature of a settlement or advancement in expectation of marriage must be in writing.[1]

6. Another clause of the fourth section of the statute relates to agreements that may not be performed within a year. This does not apply to agreements which, at the time of making them, are understood by the parties to be fairly capable of completion within a year regardless of any circumstances, although in fact their execution may extend far beyond that period. It, therefore, does not apply to a contract for personal service for an indefinite period, or for a term of years, which will end with the death of the servant.

[1] See Vol. IV, § 26, p. 950.

for the reason that the contract may be fully performed within a year. Nor does it apply to any kind of contingent contract that may be performed within that period; for example, the payment of money on the return of a ship.

Contracts that are to run for one year from the day following their execution are not within the statute for the reason that, in computing the time fractions of a day are excluded, also the first day and the last day. But if the excess be ever so little beyond this, the statute applies to the agreement.

7. Another clause relates to the sale of land, or an interest therein. The language here used is very broad, and includes within its scope all leases of real estate for any period no matter how short; but, in some states, leases having a period not exceeding one year are by statute declared valid, even though they are not in writing. It may also be remarked that it is not always easy to distinguish between an interest in land and a mere lease to use it for some special and temporary purpose; for example, to put hay or grain there, or to keep a wagon or implements, for a license need not be in writing, while an interest in land must be, to comply with the statute. With respect to fruits and nursery trees, the courts generally hold that such contracts are not an interest in land, whenever the intention of the parties is to remove them at once, or within a short period.

An oral agreement between the owners of adjoining lands relating to the maintenance of a line fence between them is not within the statute. Nor is an

agreement between them establishing a boundary when the true boundary is unknown or in dispute.

An agreement for the sale of a fixture which is not a part of the realty does not come within the statute. Nor is the sale of a fixture that is generally considered as realty which is to be severed by the seller and delivered to the purchaser. Such a contract need not be in writing; nor need an agreement between landlord and tenant for the removal of a building erected by the latter on the premises; nor a contract for the sale of growing crops.

8. Next may be considered the nature of the writing required to satisfy the staute. It need not be on a single piece of paper. If there are several letters from which a contract can be formed these are clearly sufficient for the purpose. Not infrequently a letter, or a series of letters, exists from which a contract can be made out. Whether there must be a consideration in writing or not is a disputed question, some of the courts holding that this must thus appear; others that it may be proved by other evidence. With respect to the signing this need not be technical or formal. If a party writes his name in the beginning, or in any part of the agreement with that intention, this will be regarded as a sufficient signing to satisfy the statute. Moreover, the signing is sufficient if printed or written with chalk, or any other material with which writing or printing can be legibly done, as the statute does not specify the use of any particular material. An agent, of course, can sign for his principal. A signature by an agent will suffice.

The memorandum must contain the names of the parties and all the other essentials of a contract. Again, the records of a corporation, containing the terms of the contract and duly signed by the proper officer, are a sufficient memorandum to satisfy the statute.

9. The seventeenth section relates to the sale of goods, wares, or other merchandise. The amount varies from thirty to fifty dollars in the statutes of the several states. To comply with this there must be a delivery and acceptance. For example, A meets B and agrees with him to purchase one hundred cords of wood for five hundred dollars. B sends the wood immediately to A. but, as the statute requires an acceptance or actual receipt of a portion, A may return the wood if he desires without any reason; and, if there has been no signed written memorandum or actual receipt of a portion, B cannot recover his money. A delivery is sometimes said to be constructive. For example, the delivery of the key of a building in which property is contained; or, if the goods are in storage, the making of an entry by the direction or assent of the vendor on the books of the warehouseman; or the delivery and receipt of a bill of lading properly endorsed; or the pointing out of the thing if it is difficult of removal. It is said that delivery and acceptance are sufficient if there has been any transfer of possession or control of the property by the seller to which the purchaser has assented, whereby it is intended that it shall pass from the seller's possession into that of the buyer's. With

respect to earnest money it may be remarked that part payment may be of any amount which the one party may choose to pay and the other to accept.

10. A contract to make and deliver an article is not within the meaning of the statute, but a contract to deliver a thing without any reference to its manufacture at a future time is within its meaning. Says Parsons, after showing the difficulty in extracting, from the numerous and contradictory decisions, a rule: "A pure executory contract for the sale of goods, wares, or merchandises, is as much within the statute as a contract of present sale. A contract for an article not now the seller's, or not existing, and which must, therefore, be bought or manufactured before it can be delivered, will also be within the statute if it may be procured by the seller by purchase from anyone, or manufactured by himself, at his choice, the bargain being in substance as well as form, only that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price. But, if the contract states or implies that the thing is to be made by the seller, and also blends together the price of the thing and compensation for work, labour, skill, and material, so that they cannot be discriminated, it is not a contract of purchase and sale, but a contract of hiring and service, or a bargain by which one party undertakes to labour in a certain way for the other party, who is thereupon to pay him a certain compensation; and this rule is, therefore, not within the statute."[1]

[1] Vol. III., p. 60.

11. The statute does not apply to executed contracts. But an oral contract within the statute, partly executed, will control the rights of the parties to that extent.

§ 6. Payment

1. Payment can be made only in cash.
2. What is meant by a tender.
3. What kinds of money may be tendered.
4. Why not all kinds.
5. Effect of tendering payment.
6. A creditor cannot afterward take advantage of an informality.
7. A lawful tender and payment into court is a good defense.
8. A note or check is not absolute payment.
9. Whether it is payment is a question of intention.
10. Is the note of a third person payment?
11. A creditor should be diligent in collecting a check.
12. When a check is not paid, a creditor can collect original debt.
13. Application of money when the debtor owes several debts.
14. Application by bank of a customer's deposit in payment of his note made payable there.
15. Application of customer's deposit to note not made payable there.
16. Bank cannot pay unmatured note.
17. Nor apply trust money in payment of his note.
18. If note is endorsed bank must apply customer's deposit in payment.

19. Unless the depositor has appropriated it.
20. What can be done when the deposit is insufficient.
21. Who may make payment.
22. Where shall payment be made.
23. To whom shall payment be made.
24. Effect of part payment.
25. Effect of a discharge under seal of a debt partly paid.
26. When payment is presumed from lapse of time.
27. Payment in counterfeit money.

1. Many questions have arisen concerning the mode of making payments. Parties may agree to any mode of payment they please.[1] The amount may be paid in money, or by a bill or note. Unless an agreement is made, the only payment known to the law is cash. This a debtor must pay when his debt is due, or at least he must tender the amount due to his creditor.

2. What is meant by tendering payment? It means the offering to one's creditor in legal money the amount due him. Not every kind of money can be used in making a tender. First of all, cash can be used for this purpose, by which is meant gold or silver.

3. Silver coins, except the dollar, are a legal tender only to the amount of ten dollars, and the minor coins, the five and one-cent pieces, to the amount of twenty-five cents. There are many kinds of paper money and gold certificates. Only one kind can be used in making a tender in all payments—the notes

[1] For forms of bonds for paying money see Vol. VI, Appendix, No. 19.

issued by the United States Government, and commonly called legal-tender notes. National bank notes are a legal tender to the Government, and by one national bank to another, but cannot be legally tendered in payment of a debt by one individual to another.

4. Why has not a national bank note the same legal-tender power as a United States note? Because Congress has declared what notes shall be a legal tender and what not. One may ask, is not a five-dollar bank note worth as much as a United States note of a similar denomination? Unquestionably, yet this does not endow it with legal-tender power, except to a limited degree, as already explained.

5. If the proper kind of money is not selected and used by the debtor in making a legal tender, the law regards him as not having offered to pay his debt; and, if his creditor should sue him for the amount, he could not claim or defend that he had paid it, or made a legal effort to pay it. On the other hand, when a debtor has offered to pay his debt in legal money, then his creditor, should he sue for the amount, could not recover the costs of his suit, but simply the money that was offered or tendered to him.

6. Generally, if a tender be refused for any specific reason the creditor cannot afterward take advantage of any informality to which he did not object at the time the tender was made. A tender of a larger sum than is due may be made, but, should the debtor require a repayment of the balance, the tender would not be good. Furthermore, there must be no con-

dition at the time of making a tender, not even that it shall be received as the full amount due; nor can a receipt in full be demanded, but a receipt for the amount tendered or paid may be.

7. If a creditor declined to receive the amount tendered by his debtor and was sued, he might tender the amount he thought due to a proper officer of the court; and if the judgment against him were not for for a larger amount the costs of the action would be thrown on the plaintiff.

8. A note or check given for a bill or other obligation is not an absolute payment. It is of no higher character than the note itself, which is not money Again, a note given after the accounts between two parties have been settled is evidence of the settlement, but not payment of them. But, in every case, it is payment provided the parties agree that it shall be. Unless such an agreement is made the note or check is conditional payment only, and remains so until the note or check is paid. When this happens then the bill for which the note or check was given is paid, but not before.

9. Whether the note, check, or other instrument is to be considered as payment or not is a question of intention. Unless this is clearly proved the instrument does not operate as payment.

10. Is the note of a third person, transferred to a creditor, payment of the debtor's debt? It is presumed to be payment when this is understood by the parties as shown by the creditor's giving the debtor credit for the amount. A debtor who endorses such

a note is liable simply as an endorser, and he can be held only in that capacity.

11. A check is often given in settlement of an obligation. On such an occasion the receiver has a distinct duty to perform. He should present it within a reasonable time to the bank on which it is drawn for payment. If this is not done, and the bank should fail, the holder of check would be the loser. The debtor has given him an order on a bank in which he has money, which it is the creditor's duty to collect within reasonable time. It is not reasonable to hold the debtor always liable for the money.

12. When the check or note thus given is not paid on due presentation, the creditor can collect the original debt if he desires, as this remains against the debtor as if no note or check had been received.

13. If one owes several debts to his creditor and makes a general payment, the question sometimes arises how shall the money be applied? First, the debtor can designate how it shall be, and if he does not, then the creditor can apply it to whatever debt he pleases; if he makes no application then the law has established some rules. These are, first, if the debts bear interest and none has been paid, the money must be applied first to that and then, if a balance remains, to the principal. If there are several items the money must be applied to the oldest. Again, if there are several claims secured in different ways, the law applies the money to the oldest secured claim; and if a surety is holden on this he also may insist on this application of the money, and should the

amount be sufficient he would be discharged. The money will not be appropriated in the way most advantageous to the creditor to the loss or injury of a surety; on the other hand, he cannot require a general payment applied to the last debt on which he may be the holder, regardless of the interests of the creditor.

The general rules that apply to debtors and creditors in making payments apply only to voluntary, and not to involuntary payments determined by law. In these the application varies with the circumstances of each case.

14. The application by a bank of funds in its possession belonging to the maker of a note *payable there* may next be considered. In most states such a direction in a note is regarded very much like a check. It is an imperative order to pay the note. By the Negotiable Instruments Law, "where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

15. In other states to such a note a different rule applies. The bank may exercise its discretion in paying it. The bank may take the risk of collecting the note, and permitting the depositor to withdraw his deposit. In most states banks pay, when depositors have sufficient funds, and are protected by the law in so doing. In the smaller number this right or duty is withheld from them.

16. In no case, except that of insolvency, can a bank pay an unmatured note of a depositor.

17. Nor can a depositor of trust money, which is known by the bank to possess this character, though deposited in an individual name, be applied to the payment of the depositor's obligation.

18. In some of the states, if the note has been endorsed or guaranteed, the bank has no discretion, and must apply the maker's deposit on his obligation, though a neglect or mistake to do so does not relieve the maker from payment. This is quite similar to the rule that requires a creditor who has the means for paying his debt to apply it in this manner. The note is in effect a draft or order on the bank in favour of the holder and discharging the endorser. This rule, however, does not apply to a note payable at a bank and presented there after its maturity. Its payment is not required for the protection of the endorser. If, therefore, no application of the depositor's money is made, the endorser is not discharged. Generally, a bank declines to pay a note that is presented overdue, but no prohibitory rule against doing so has been established except in those states, a few in number, in which a bank is forbidden from paying the notes of its depositors without specific direction.[1]

19. When a depositor has made a special application or appropriation of his deposit, and has notified the bank of his action, it cannot charge off a note against his deposit, for a man may do what he will with his own so long as he retained control over it.

20. Again, if the maker's deposit is insufficient for

[1] See 1 Daniel, on Neg. Inst., Sec. 326b, .or authorities.

this purpose, must the bank apply it in part payment of his obligation? Perhaps the same rule should be applied to a note that is applied to a check—the deposit can be paid whenever the holder is willing to receive the same.

21. The tender must be made by the debtor or persons whose duty it is to act, or by his agent, or legal representative, and not by a mere stranger or intermedler, but a person financially interested in the discharge of a debt security, or the like may make a valid tender. Even a tender by a stranger is effective followed by its ratification by the debtor.

22. Next may be considered the question, where shall payment be made? In promissory notes the place of payment is often mentioned. If the maker of a note is at the place mentioned during business hours of the day of payment, and the creditor is not present, all persons who have endorsed it are discharged, but the maker will remain liable. Thereafter the debt will be regarded as payable at the payee's residence, or wherever he may be found by the maker. The maker's liability is the same as it would be on a note payable on demand, having no place of payment specified. If no place of payment is mentioned payment must be made at the residence or place of business of the creditor. It is not the creditor's duty to find his debtor and demand payment; on the other hand, the debtor must find the creditor and pay him.

23. Next we may inquire to whom, besides the principal creditor, may payment be made. First, we re-

mark, to an attorney who is employed to collect the debt. This, however, does not necessarily justify payment to the attorney's agent. Second, payment may be made to any agent of the creditor who is authorised to receive payments in the ordinary course of business, or to a person who appears to be authorised to do the creditor's business, whom the creditor permits to assume such appearance. Third, payment may be made to a trustee, or to one of several executors. Fourth, to one of several partners. Payment may be safely made to one after the other partners have forbidden the debtor to pay him.

24. What is the effect of part payment? If this is made before a debt is due and received by the creditor by agreement that it shall be in full discharge, it is effective. The receipt also of something beside money in satisfaction of a debt, though apparently inadequate in value, is a good payment. So is the acceptance of a new security, even though for a less amount, taken by agreement in full payment of the debt.

25. Again, when only a part of a debt is paid in money and the creditor gives a discharge, under seal, of the whole debt, he cannot collect the balance. In some states it has been questioned whether, if such a discharge or receipt is given without a seal, the debt is paid. The reason is that a payment of only part of the money cannot properly be deemed a consideration for the discharge of the whole debt. But a release or a receipt therefor under seal by the creditor, even though it be of a part for the whole, will

be effective, and, in some states, even though the receipt is not underseal, discharges the debt.

26. After twenty years, if nothing appears to the contrary, the presumption of payment arises. And a jury may infer payment from circumstances within that time. It may arise from the possession by the debtor of the evidence of his indebtedness.

27. Payment in counterfeit money is not good, and will not discharge indebtedness if both parties were ignorant and payment was made in good faith. But if the bank that issues the money receives it, the loss must be borne by the bank on account of its negligence, whenever the debtor acted innocently in making payment. A creditor thus receiving counterfeit money should give notice within a reasonable time that the money was counterfeit, otherwise he will be concluded by the payment.

§ 7. Interest

1. What is usury.
2. Penalty for taking more than the legal rate.
3. The tendency is to diminish the penalty.
4. Double ground on which interest may be demanded.
5. On what debts interest is allowed.
6. The same subject.
7. When interest begins on a note payable on demand.
8. Modes of escaping usury.
9. Notes purchased.
10. Difference between discount and interest.

11. The legal rate when parties live in different places.
12. What rate can be collected when no place of payment is specified in a note.
13. Interest on notes and other obligations paid in instalments.

1. Interest means the payment of money for the use of it. In most civilised countries this is regulated by law. It declares how much money may be paid and received as a maximum for the use of money. This is called legal interest. If more is paid, or an agreement is made to this effect, it is called usurious interest. By interest, therefore, is commonly meant legal interest, and by usury, usurious interest. Formerly the regulations concerning the rate of interest were more strictly enforced than they are at the present time.

2. When more than the legal rate is taken, as both are parties to the transaction, neither ought to suffer in consequence of the conduct of the other. This feeling has become so general that only now and then does a borrower attempt to enforce the law against the lender, knowing that public sentiment is opposed to his action.

3. The tendency of the law has been to diminish the penalty for taking usury. There was a time when the lender forfeited all the interest as well as the principal whenever he made a loan of a usurious character. Now, the penalty, in most states where a usury law exists, is only the forfeiture of the interest, or of the excess beyond the legal rate.

The provision of the national banking law is peculiar. A bank may take any rate prescribed by the state where it is located; and where no rate is fixed it is limited to 7 per cent. If it has taken more than the proper rate the borrower may recover "twice the amount thus paid"; if more than the proper rate is to be paid the entire amount of interest is forfeited.

4. Interest may be due and demanded by a creditor, either because the debtor has agreed to pay it, or because the creditor has sustained a loss through the debtor's withholding money that is due. Indeed, it is a well-known rule of law that, whenever money is withheld which is clearly due, the debtor is regarded as having promised legal interest for the delay. The usage of trade and the customary course of dealings between parties have great influence in these matters. Thus, in New York, the courts long ago decided that a buyer who knew that it was the uniform custom of the seller to charge interest after six months on articles sold without payment could be compelled to pay interest after that date.

Interest can only be demanded on contracts in cases specified by statute or by a special promise to pay interest. Such a promise can be inferred from circumstances, or the particular mode of dealing adopted by the party, or the usage of trade. A custom to charge interest on account after maturity does not generally create an implied contract to pay it unless the debtor knew of the custom.

5. In general, interest is allowed on a debt that is

due by a judgment of a court; and on a settled account, from the day of settlement; on goods sold, from the time of the sale, if no credit has been given, and, if there has been, from the day of expiration of the credit; on rent, from the time it is due; also on money paid to another or lent to another, from the time of paying or lending it.

6, Many questions have been raised with respect to the collection of interest on various kinds of debts. Besides those mentioned a few others may be noticed. For example, a city is not liable for interest on its bonds after they have matured, provided the funds are ready to meet them at maturity. It is not required to seek the holder and tender to him the money. On the other hand, it is his duty to demand payment of the obligation at the time fixed for its payment. If he does not there is no reason why the city should be required to pay continuing interest.

7. It sometimes happens that money is due, but is not payable. Thus, the money on a note payable on demand is always due, but it is not payable until the holder demands it; and does not draw interest until he has demanded payment. But a note payable at a fixed time carries interest from that date whether it is demanded or not.

8. There is no special form or expression necessary to make a bargain usurious. Formerly, when the usury laws were more generally enforced than they are now, there were various methods adopted for evading the law. One of the most frequent ways in borrowing from banks was to agree that a con-

siderable portion should remain on deposit. The effect of this was really to borrow a much smaller sum than that on which interest was paid. It was very difficult to trace usury in this proceeding. Another common way was to solicit a loan through another person to whom a commission was paid, which was divided between the solicitor and the lender. In this way the lender received a larger sum for the use of his money than the rate of interest specified.

9. Often this question had been raised on a note sold to a third person. Of course, the owner has a good right to sell it for any price he pleases, and when this is done in good faith, in other words, when the sale is real, there is no taint of usury in the transaction. But sometimes a sale is merely for the purpose of obtaining more than the rate of interest, and then the transaction is tainted with usury. Usually, a person who makes his own note and sells it for what he can get is a borrower rather than a vendor, though the transaction has the appearance of a sale.

10. It may be remarked that banks, in discounting notes, do not actually discount them; they simply collect interest in advance on the money loaned. In discounting a note such a sum is given to the borrower as will, at the end of a specified period, at an agreed rate of interest, amount to the sum he is to pay at the end of that period. Suppose one wished to have a note discounted for $100 at a bank, payable in one year from date, what would the bank do? If the legal rate were 6 per cent., the bank would return

$94 to the borrower, expecting that at the end of the year he would pay $100. Suppose the bank should agree to discount the borrower's note for that period at 6 per cent. interest, what would the borrower receive? Something more than $94, for the reason that this sum, at 6 per cent., would not amount to $100 at the end of the year. The bank must give him $94.34, for the reason that this sum, at 6 per cent. interest, would only amount to $100 at the end of the period. The taking of interest in advance, although not true discount, has been regarded for a long period as legal.

11. The rule prevails everywhere that the parties may contract for the rate that prevails at the place where either party resides. Thus, if a lender resides in Ohio, where the legal rate is 6 per cent., and the borrower lives in Iowa, where the lagal rate is 8 per cent., a contract would be legal specifying the higher rate of interest.

12. Generally, a note is made payable at a particular place, but not always. When an omission occurs then it is payable at the place where it was made, and bears the rate of interest established by the law of the place of its birth.

13. When a note, bond or other security is paid in instalments, the interest may be computed in three ways. One way is to compute interest on the whole sum to the day of payment, and also on each instalment from the time it was paid to the time of making the final payment; and the difference between the instalments paid and the interest thereon, and the prin-

cipal sum and the interest thereon, is the amount due. Another way is to compute interest on the whole sum to the time of the first payment, and add this to the principal, and then deduct the instalment; repeating the operation whenever an instalment is paid until the time of final payment. The objection to this way is, if the instalment is not equal to the interest earned and computed on the principal sum at the time of paying the instalment, interest is thereafter earned and computed on interest, and the creditor therefore receives compound interest. To obviate this objection the third way is to compute the interest on the principal sum from the time when interest became payable to the first time when a payment or payments with the interest computed on them shall equal, or exceed, the interest due on the principal. Then this sum is deducted therefrom, and future interest is computed in the same manner as before. By this method payments are applied, first, to reduce the interest, and secondly, to diminish the principal of the debt; and the creditor does not receive compound interest. Many of the states, by statute, have established a mode of computing interest on obligations paid by instalments.

§ 8. Damages for Non-Fulfilment of Contracts

1. Guilty party is liable.
2. Deceit.
3. Passive concealment is not deceit.
4. To obtain redress what must be shown.

5. Modes of practising deceit.
6. It must be sufficient to influence a person.
7. It must be false.
8. Deceit in statements of directors.
9. Deceit concerning credit.
10. Deceit in use of trade-marks.
11. Deceit growing out of a partially false statement.
12. Non-liability when information is open to both parties.
13. Deceit concerning statements of law.
14. How fraud may be proved.
15. Damages in cases of written contracts.

In neglecting or declining to execute contracts one party or the other is often guilty of a legal wrong. In any event the guilty party can be compelled to respond in damages for not fulfilling his undertaking.

In other cases the failure to execute is excusible, or is the result of an agreement or understanding between the parties.

2. Deception or deceit is one of the wrongful elements surrounding or inhering in a contract. A person deceives another in making or not fulfilling a contract, and then the injured party may sue for damages for the wrong inflicted on him. The question in this large class of cases is whether the deceit is of such a nature that the law will recognise it and make the wrong-doer responsible to the other for the injury he has sustained.

A representation must be distinguished from a warranty. A warranty is a representation, but there are

many cases of representation in which no warranty was made or intended. Setting aside the cases of warranty for consideration elsewhere, we will take up the cases of representation pure and simple, and consider which are, or may be, the subject of a legal action.

3. A passive concealment or withholding of information does not always form the subject of an action. For example, a person learned of a declaration of peace between this country and Great Britain in 1815. Furthermore, he knew that the effect of this peace would be to greatly enhance the price of tobacco. Acting on this information, he bought a large quantity from a person who was ignorant of this welcome news, though, as the sequel proved, it was not welcome to him. After making peace, the price rapidly advanced, and the seller was unwilling to execute his contract. His defense was deceit, but the court decided against him, saying that it was not the buyer's duty to impart his news to the other party; his ignorance was his own affair, for which the other was not responsible.

Another case may be given—that of a man who buys lands knowing there is a coal mine underneath, of which the seller is ignorant. The buyer keeps his knowledge to himself, until after the purchase, when the other, deeply chagrined, brings his action for deceit. Clearly enough, as there has been no deceit, there can be no recovery.

4. To obtain redress it must be shown, first, that there has been a false representation of something

material; second, that the person who made it knew that it was false; third, that the other person to the contract who suffers thereby was ignorant of its falsity and believed it to be true; fourth, that it was made with the intention that the other party should act upon it; and, lastly, that the party thus acting has been injured. Thus, a person who is induced to endorse a promissory note before its maturity by reason of a false representation cannot maintain an action against the maker for doing so until he has been compelled to pay the note. All of these elements are needful to make out of the deceit a legal wrong.

5. Deceit can be practised in various ways. A nod of the head or some particular movement, silence, a sign—in all cases there must be a clear act if some kind to effect this purpose. The highest authority on this subject says that, to constitute a representation, it is not necessary, in using language, that the statement should be made in terms expressly affirming the existence of some fact. If the statement be such as would naturally lead the plaintiff, as a man of ordinary intelligence, to suppose the existence of a particular state of facts, that is as much as if statement had been made in exact terms.[1]

A fact must be stated. This must be distinguished from an expression or some half-vague knowledge. On this point the cases are often confusing. By the modern law a mere impression is not enough; in some way the plaintiff must have been misled by the other party, and intentionally so, to create such a

[1] Bigelow on Torts, § 121, p. 60, Seventh Edition.

representation as the law will recognise as wrongful.

6. The statement must influence the conduct of a man of ordinary intelligence. This point is of great importance. A person may go into a store with a view of purchasing a piece of cloth, and inquire of the seller the composition of the piece that pleases him. Suppose the seller, as often happens, is quite ignorant of the nature of the fabric in question, and should state wrongfully its composition, would the other person have an action for deceit against the seller? This depends on the question whether the buyer is deceived and suffers injury.

Mr. Bigelow says: "In ordinary cases the representation must be such as to influence the conduct of a man of average intelligence, but the courts do not turn over the simple-minded man to be the prey of rogues. If a person is mentally deficient, or is but a child, the court will protect him from designing men where they would leave others to their own folly."

Two cases may be supposed, which doubtless happen every day. The one is that of an ignorant seller who unintentionally makes incorrect representations concerning the article of sale; the other is that of an intentional misrepresentation. In both, as often happens, if the buyer knows more about the subject of the sale than the seller, he is not deceived, and therefore has no legal action against the other—even though the seller may have lied deliberately throughout the transaction—for the simple reason that the buyer has

not been deceived. It is not enough, therefore, to make a wrongful representation; it must be effective in deceiving and injuring the buyer in order to give him a right of action.[1]

7. A statement made by a seller with the view of influencing the buyer's conduct, and having that effect, if it is false and injures him, is actionable. To show that the statement was false either in law or morals will not suffice; an injury or damage must be proved to give a remedy. Such a statement may possess many different characteristics. Suppose a landlord should say to one who was negotiating for the purchase of his house, that he rented it for so much a year, when the truth was otherwise, the statement would be actionable. In like manner a statement giving the false age of a horse, or his speed, falls under the same head. Also, a statement concerning the number of acres contained in a lot of land, if it prove to be false. These are a few examples from a large number of cases that might be given.

Moreover, the defendant cannot escape liability by showing that the words might be true if taken in a forced or unnatural sense. The other party has a reason for regarding the words in the sense in which they are ordinaily used, and this is the way the law looks at them as already stated.

8. Cases not infrequently occur in which a person permits his name to be used as a director or trustee of a company that issues a prospectus containing false representations. How far is such a representation

[1] § 133, p. 62

binding on him? In other words, to what extent can he be made answerable for the damage done to the person, who, relying on such representation, has been led to enter into some business engagement resulting in loss to him. In one of the leading cases in this country it has been declared that, though such a prospectus be false, it does not impose on the director in law the duty to know the truth of the statement and to subject him to liability therefor. Of course, a director who knows that the prospectus is false would be liable for the consequences, but the law does not impose on him the duty of knowing whether a prospectus or other statement is true or otherwise.

This rule, however, is surrounded by some limitations. A director cannot always plead ignorance. In many cases it is his duty to know, and he is responsible if he does not ascertain the truth. Thus, while the law does not require a director to make a careful examination of the bank reports sent to the national controller of the currency, to ascertain their entire truth, yet he cannot wilfully close his eyes and make no examination whatever concerning the truth of the statement.

The cases of false statements put forth by directors are multiplying. Some of the statements are made for the purpose of deceiving the public and enabling directors to dispose of their stock at an advantage. The law brands all such attempts as frauds, and those who make them are liable therefor.

9. Not infrequently persons are asked concerning the ability of others, or whether they are entitled to

credit or not. Bank officials, for example, are frequently asked by customers desiring information of this kind. The books of late years contain numerous cases in which such information has proved to be misleading, and those who have depended thereon, perhaps in a fit of anger, have endeavoured to recover for their loss from the cashier or other person who has innocently drawn sellers into trouble. The courts have been quite uniform in declaring that, in such cases, the persons making such statements are not responsible or liable for an action in damages, except when the proof shows that they have intentionally misled others.[1]

Another example which may be given is that of a person who is about to supply a man's son with goods on credit, and who inquires concerning his property, and is told that he is worth $5,000; but the informant says nothing concerning the son's indebtedness. In one sense the answer given is correct; the son has this amount of money; nevertheless, in another sense, the representation is false, and the person who makes it is responsible for his deception, should the other surfer thereby.

10. The long-continued exclusive use of a trade-name, though primarily intended to be descriptive of the quality of the product, entitles the user to protection against its unnecessary adoption and use by another which is calculated to deceive purchasers, the use having been retained for that purpose. Thus, a complainant had for eighteen years made and sold

[1] See the recent case of Taylor v. Thompson, 176 N. Y., 168.

food products under the name of the Health Food Company. During this time the name had become widely known and identified with his products. Then another manufacturer of similar products adopted the name Sanitarium Health Food Company. The court decided that, although the use of the latter was accompanied by no similarity of packages and the place of the manufacture shown thereon was different, it was calculated to deceive purchasers and constituted unfair competition, as there was no necessity for its adoption. The complainant, therefore, had good cause against the other party for relief.

11. There may be deceit growing out of a partially false statement of a matter. For example, a man who is desirous of buying stock of a woman who knows nothing about the value tells her of a fact calculated to depreciate its value, but omits to tell her of other facts within his knowledge of an opposite character. This is a misrepresentation for which an action would lie.

12. A seller is not liable for deceit when the means of information are equally known to both parties as already stated. Thus, a person who goes into a store to buy a bushel of potatoes that are in a basket before his eyes cannot complain legally should half of them prove to be unsound, unless he inquired of the seller at the time of buying them, and their soundness was falsely represented.

(*a*) This principle has a wide application. Of late years the judicial tendency is to make a seller liable in most cases wherein it would not be easy for the pur-

chaser to make an examination of the nature of the purchase for the purpose of proving or disproving the truth of the seller's statement. Thus, should a seller say to a buyer concerning a piece of land which was the subject of contract that it was free from encumbrance, and that the title was all right, and make other representations of like character, the buyer could ascertain the truth or falsity by making an examination of the records, if he pleased. Therefore, if he chooses, he can trust to the statement of the seller and hold him liable for any misstatements.

(*b*) It is not easy to distinguish between the cases in which the buyer ought to make some examination and those in which he is not required to make any. As time nowadays is an important element in the life of every person, he is not required to make examination in those cases where this cannot be done without considerable loss of time and inconvenience. But this rule does not apply to all matters. Thus, were the purchaser of a ship told by the seller that it was sound and correct in every respect, the law would, nevertheless, require the buyer to make some kind of examination. As the sale is important, the law imposes a duty on him to do something in the way of ascertaining the truth of the seller's statement.

(*c*) There are many cases in which the buyer is wholly ignorant of the nature and quality of the thing sold, and must trust to the seller's statement. This is particularly so in buying precious stones and other subjects into the examination of which great skill or technical knowledge enters. In such sales the state-

ment made by the seller goes farther than in other sales wherein the buyer also possesses some knowledge concerning the nature of the things purchased.

(*d*) A seller who covers up a thing in such a way as to prevent the buyer from having as good knowledge as he himself possesses commits a wrong for which he is responsible. Thus, the owner of a ship who intentionally covers up defective places so that it will be difficult for the buyer to see them, who is thereby misled concerning its worth, is liable to an action by the buyer for the fraud that has been practised on him.

(*e*) To a contract in writing this principle does not apply. In such cases the court demands of both contracting parties that they should have knowledge of the instrument, and, if the buyer is misled, it is his own fault in not reading the paper. Surely, there is no ground for neglect or excuse for deception on his part.

13. Next may be considered the effect of misrepresenting the law that applies to a proposal contract. Whatever representation a person may make concerning this is not binding in any way, and cannot be the subject of an action of deceit because it is presumed, for the safety of society, that all understand the law.

But a person having superior means of knowing the law, and professing to know it, though not a lawyer, who should knowingly give information to influence the conduct of an ignorant person, would be liable for an actionable misrepresentation. Thus, an old citizen who professes to be familiar with the land

titles of the country meets an immigrant and proposes to sell to him a piece of land, assuring him that the title is good. It is true that the immigrant could examine the title, or employ an agent, and thus assure himself of its truthfulness. Should he, instead of doing so, trust to the representation, which should prove to be false, he would have an action against the person who made it.

14. Fraud may be proved in several ways: First, by showing that the defendant made a representation, knowing that it was false; second, that he made it recklessly without knowing whether it was true or false; third, that he made it positively of his own knowledge when he only believed it to be true without having actual knowledge; fourth, that he made it under such circumstances that it was his duty to know whether the representation was true or not.

15. The damages for not fulfilling a written contract depend on different principles. Very often the contract itself states what damages shall be incurred by its non-fulfilment.

CHAPTER XI

CONTRACT OF AGENCY

1. The relation of principal and agent.
2. A person can act as agent who cannot act for himself.
3. Agents are general or special.
4. In what ways authority may be given to agents.
5. Effect of repeating acts.
6. An agency may be established by adopting and ratifying a person's acts.
7. An agency may be established without disclosing the principal's name.
8. Description of several kinds of agents.
9. Auctioneer.
10. Authority and duties as a cashier.
11. And of other agents.
12. The authority of a general agent to make contracts.
13. What a general power implies.
14. The authority of a special agent to make contracts.
15. Authority of joint agents.
16. Effect of usage.
17. When authority to sell contains authority to warrant.

18. Authority to sell implies an authority to sell on credit.
19. Authority to sell on credit does not confer authority to collect.
20. Authority to sell includes authority to sell by sample.
21. Authority to receive payment.
22. Authority to collect is not authority to receive a note.
23. Authority to settle a claim is not authority to give a discharge for nothing.
24. What a principal may do after an unauthorised sale by his agent.
25. An agent cannot buy his principal's property.
26. An agent cannot appoint a subagent.
27. A principal may revoke his authority.
28. When a general authority may continue after revocation.
29. Neither can dissolve the relation in an unfair manner.
30. The degree of care that an agent must exercise concerning his principal's affairs.
31. An agent should keep an account of his doings.
32. Knowledge acquired by an agent relating to his business affects his principal.
33. How far notice to an agent affects his principal.
34. Invasion of rule in cases of agent's opposing interest.
35. The liability of a principal for his agent's fraudulent representations.
36. He is not responsible for his agent's criminal acts

37. The wrongful act of a corporation's officers may be visited on it.
38. An agent is responsible to his principal for a loss arising from neglect of duty.
39. When goods wrongfully purchased by an agent can be taken by his creditors or principal.
40. Various ways by which an agent becomes liable.
41. If he wrongfully takes his employer's property the latter can recover it.
42. A person cannot hold an agent liable if he permitted him to act while he exceeded his authority.

1. Having described the general principles relating to contracts, the way is prepared for describing the principles that apply to persons in special relations, and the first of these is the relation of principal and agent. One of the peculiarities of modern business is the transaction of so much in a representative manner.

2. We may begin our inquiry by asking, what persons are competent to act as agents? This question is important for the reason that a person who is disqualified from making a contract on his own account can sometimes act for another. Thus, a person, under age, or a married woman, or an alien, may act as an agent, even though he or she is incapable of acting in any other manner.

Both by common law and modern statutes the wife may be the agent of her husband. When a man maintains a domestic establishment, placing his wife in

charge, the law implies, as domestic manager, that she has power to make those contracts and purchases pertaining to the household which naturally and ordinarily belong to a wife's management of a house—supplies for the home, clothing, domestic service, medical attendance and the like.

In general, every person who is competent to act in his own right and in his own behalf may act as an agent.

3. Agents are of two kinds—general and special. A general agent is authorised to represent his principal in all of his business, or in all of a particular kind; a special agent is authorised to do only a specific thing, or a few specific things.

4. Authority may be given to agents in several ways. One of the ordinary modes is by writing, often under seal, called a power of attorney or procuration.[1] In many cases an agent acts only by oral authority. An agent may be thus appointed, possessing authority to make a written contract, but he cannot execute one under seal. An agent, however, may fill blanks in deeds by oral authority, though this is contrary to the old rule that the authority to do this must also be authorised by a sealed instrument containing similar authority.

Though this rule is firmly established it is highly technical and stands on narrow ground. "The whole theory of the solemnity of a seal is totally unsuited to the business methods of the present day and the constant tendancy of courts and legislatures is to ig-

[1] For form see Vol. VI, Appendix, No. 26.

nore the distinctions formerly founded upon its use."[1]

5. Whoever deals with a person repeatedly employed to do specific things, for example, to sign bills, receipts, policies, or to make purchases, is justified in believing him to be authorised to do these acts with the consent and approval of his employer. But an agent who is usually employed to buy, though always for cash, possesses no implied authority to buy on credit. On one occasion a note was signed by the son of a member of a firm. He was at that time their bookkeeper and manager. It was not customary for clerks to give notes, though he had done so in some cases. The court remarked that a single act by a servant, without disapproval, had justified a person concerned therein in trusting him afterward. A principal is bound by the act of an agent no further than he is authorised to bind him, but the extent of an agent's power is ascertained from facts as well as words. The law often is that he who trusts must pay. In the case under consideration the clerk was an authorised agent for many purposes. Whether he had authority to make the note or not was a question of fact for the jury, and was decided by them affirmatively.

6. An agent's acts may become valid by the principal's adopting and ratifying them; and a corporation, like an individual, can bind itself by ratifying the acts of its agent. The ratifying of a contract necessarily implies the relation of principal and agent; and, in so doing, his authority relates back to the beginning

[1] Mechem on Agency, § 1214.

of his exercise of it. No ratification is effective to bind a principal unless in the clear light of all the material facts, for the law does not presume that he will ratify the conduct of his agent in the dark. Generally, one who receives and holds the beneficial result of the act of another performed as his agent is not permitted to deny such agency.

Thus, should an agent sell under seal the property of a supposed principal, and receive payment and hand this over to him, he might avoid the sale and recover the property if he could show that the agent had no authority to sell it; but such principal could not do this and also hold the money. In other words, he cannot deny the acts of his agents and still retain the fruits of the transaction. Again, a principal who knows that another is acting as his agent, and does not disavow the pretender's authority as soon as he can, and permits a person to deal with him, is regarded as adopting or confirming his agent's acts. Nor can a supposed principal adopt a part of his agent's act and reject the rest. He must adopt the whole or none. Lastly, should an agent's conduct in selling his principal's property be ratified, so also would be his representations concerning the sale.

7. An unknown principal may show that one of the contracting parties was actually his agent. He may thus make himself a party to the contract, but, if the other contracting party has acted in good faith with the supposed agent, or paid him anything in cash or otherwise, he will not be the loser by the principal's conduct. In other words, so long as a principal remains

unknown, he cannot make a party contracting with his supposed agent suffer by reason of his own silence or concealment. This would be contrary to reason. There are many cases of this kind in which a principal, for some reason or other, prefers not to be known in the transaction, and another person is employed to act for him. A principal who chooses to act in this manner may do so, but surely the other contracting party ought not to suffer through the principal's mode of doing business. Again, an undisclosed principal, after his discovery, may be liable on his contract. Lastly, one who sells to an agent knowing that he is thus acting, and chooses to charge the goods to him alone, cannot afterward transfer the charge to the principal.

8. There are many kinds of agents. Among the most widely known are factors and brokers, between whom there is a well-defined difference. A factor is a mercantile agent who sells and purchases and has possession of the goods; a broker is an agent of similar character not having possession of them. Consequently, a factor may act for his principal and yet in his own name, because the actual owner gives to him the appearance of an owner by delivering to him the goods, while a broker can act only in his principal's name. A purchaser of goods from a factor may set off against the price a debt due from him, unless he knows that they belong to another. But one who purchases goods from a broker cannot do this. Furthermore, a factor has a lien or claim on goods for the indebtedness of his principal to him, while a broker generally has not.

9. Authority may be conferred on an auctioneer in the same manner as on any other agent by formal writing, orally, or by implied conduct. No formal authority is needed even to sell real estate unless this is required by statute. But power to sell property does not imply authority to sell it at auction; and a purchaser who knows enough to put him on inquiry concerning the auctioneer's authority and neglects to use his knowledge, would acquire no title to the property. A purchaser would be protected who bought goods sent by the owner to the auction room, for this would be sufficient proof of his intention to have them sold in that manner.

In many states there are statutes prescribing who may act as auctioneer, and on what terms and conditions. These usually require that the auctioneer shall be licensed, give a bond to answer for any legal liability, and fix his fees. He is often guided also by municipal regulations.

An auctioneer employed by the owner of real or personal property to sell it at auction is primarily the agent of the owner, until the moment of accepting the bid of the purchaser. This done he becomes by the act and with the consent of the purchaser, his agent also to the extent of completing the sale and binding the purchaser by entering his name as such and signing the memorandum of sale and thus satisfying the statute of frauds relating to the sale of real estate wherever the statute exists.

By the sales act (1) where goods are put up for sale by auction in lots, each lot is the subject of a sepa-

rate contract of sale. (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. (3) A right to bid may be reserved expressly by or on behalf of the seller when proper notice has been given.

10. A cashier is another illustration of a general agent possessing all the authority necessary or usual for the transaction of his business. He cannot, however, bind his employer by an unusual or illegal contract. In one of the cases the court declared that a cashier was allowed to present himself to the public as habitually accustomed to pay bills or notes of his bank, also to pay notes discounted by the directors, to receive payment of debts due to the bank, to receive money on deposit, and to pay the same to order of depositors. He is regarded as having possession of its books, notes, and other property, and as keeping its accounts and others records. In many banks these duties are performed in part by tellers, clerks, or assistants, but he might at any time perform them if he desires. As he is a general agent, so he can bind his bank while acting within the scope of his authority, though violating his instructions.

11. The same description, with some qualifications, applies to the agents of other companies or corporations. Their acts bind their employers or companies so far as they have authorised them, or have justified

persons who deal with them in believing that they possess the authority exercised by them, or are acting within the general scope of their authority.

12. The authority of a general agent to contract is limited to the usual manner of accomplishing the business entrusted to him. Persons who deal with an agent carrying on a general business are not bound to inquire into the particulars of his authority. A person entrusted with the general management of a trade or business has an implied general authority from his employer to make such contracts as are usual and necessary in the ordinary conduct and management of the business. A foreman, for example, in a sawmill who took an order for a large quantity of lumber, and agreed to have it ready for delivery within a particular period, bound his principal thereby, though no particular authority from him was shown authorising the agent to make the contract.

13. Furthermore, a general power implies whatever may be necessary for its complete execution. For example, a general sales-agent is competent to rescind a contract of sale with the consent of the other party. One who is employed by another to act for him in the usual business or trade of an agent, as auctioneer, broker, or the like, thereby acquires authority to do all that is necessary or usual in that business. Again, a person who puts his goods into the possession of another whose ordinary and usual business is to sell goods authorises the whole world to believe that the possessor has them for sale, and any buyer could hold them.

14. On the other hand, an agent who is authorised to do a specific thing, and exceeds his authority, does not bind his principal, because the party dealing with him must inquire for himself into the extent of his authority. The distinction, therefore, between the authority of a special and a general agent is very important. In the one case the principal is bound by all acts of the agent within the natural and usual scope of the business; in the other a person who is doing business with an agent must examine into his authority and cannot hold his principal for any acts that exceed it. Of course, secret limitations are not binding on persons who are not acquainted with them.

Some illustrations may be given. An attorney who is authorised to convey a tract of land for his principal after purchasing the same cannot agree to convey it in advance of his purchase, and should he do so could not properly execute his authority, and the purchaser would acquire no title. Again, an agent who is specially employed to receive payment in money cannot vary his authority by receiving a note.

15. A power to two cannot be executed by one of them. An exception to this rule exists in the case of a joint power exercised by public agencies. Thus, either of two factors, whether joint factors or not, may sell goods consigned to both; and when they are joint agents, whether partners or not, notice to one is notice to both.

16. In commercial matters usage may add to an agent's authority whatever may be required for the discharge of his duty in the most complete manner.

Thus, an agent having authority to discount a bill may endorse it in the name of his principal, unless he is expressly forbidden to endorse it. A broker who is employed to procure insurance may adjust a loss.

17. Authority to sell includes authority to warrant whenever the usage or custom of making sales with a warranty exists; also when the want of authority to warrant is unknown to the purchaser without his fault. For example, an authority to sell a horse implies an authority to warrant the animal, because horses are usually sold in this manner. A general authority to transact business, or even to receive and pay debts, does not authorise an agent to accept or endorse bills or notes that will involve his principal. Indeed, authority to endorse is construed strictly, but such authority may be implied from the previous usage of an agent known and sanctioned by his principal. Thus, a confidential clerk was accustomed to draw bills for his employer, who authorised him on one occasion to endorse, and on two other occasions to receive money by endorsing his employer's name. The court declared that a jury might regard the clerk as authorised generally to endorse for his employer. This is an extension on very slight evidence of a clerk's authority.

18. An authority to sell implies an authority to sell on credit, if this be usual; otherwise, it does not. Consequently, should an agent sell on credit without authority from his principal, the latter may claim his goods from the purchaser, or regard the agent as responsible for the amount. An auctioneer or broker

has no right to sell on credit unless authority is given to him expressly, or by usage. Furthermore, an agent is generally responsible who mixes the goods of his principal with his own in such a manner as to confuse them. He is also responsible whenever he takes a note payable to himself, unless this is authorised by the usage of trade. Should he take a note thus payable to himself and become bankrupt, it would belong to his principal.

19. Authority to sell on credit does not authorise an agent to collect money in the name of his principal. A purchaser, therefore, who should pay him would not be protected and discharged simply by proving the agent's authority to make sales. But an agent to whom merchandise has been entrusted, with authority to sell and deliver, is authorised to receive money from purchasers. Otherwise the fraud on them, so the courts have remarked, would run into criminality.

20. A general authority to sell confers authority to sell by sample.

21. The payment of money to an agent binds his principal only when it is paid in the regular course of business. And payment to a subagent whose appointment was not authorised by the principal, renders the agent liable to his principal for the amount. Thus, a legacy left to a tradesman which was paid by the executors of the donor to one of the tradesman's clerks, who received payments daily, was not a sufficient payment to discharge the executors. A general agent who is authorised to receive money at a counter, or any person who is authorised to receive it at any particular

place and in a particular way, has no authority for receiving it in any other place or way. Nor would a principal be bound by an agent, who, having authority to receive money, should discharge a debt without receiving it and give a receipt therefor.

22. An agent having authority only to collect a debt has no right to take a note for the amount from the debtor to himself, and thus substitute himself as creditor. But the ratifying of such an arrangement by the principal would bind him, and the debtor would be released from liability to the principal on the original claim. An agent employed to receive payment in money cannot vary his authority by receiving a bill. And, surely, an agent cannot, without particular authority, commute a payment by receiving anything —a horse, for example—in discharge of a debt.

23. Again, an agent having authority to settle a claim against a carrier for the loss of goods cannot give a discharge without receiving a consideration. A mere agreement to receive other goods in the place of those lost would not release the carrier from liability. In a case in which this principle was decided the court remarked that a letter of attorney authorising an agent to collect a debt would not empower him to give a discharge on the receipt of the debtor's note. Still less would a clerk be authorised to release a liability for a claim without receiving any consideration whatever.

24. Nor can an agent entrusted with goods sell them without authority; should he do so the principal could affirm the sale and sue the buyer for the price, or

disaffirm the sale and recover the goods from the buyer.

25. An agent who is employed to sell property cannot buy it himself unless he is expressly authorised to do so; nor can a trustee purchase property held in trust for another. But, of course, a principal may ratify and confirm a sale or purchase by his agent by accepting the proceeds and delaying to make the objection after the wrongful act is made known to him. Again, should a trustee or agent sell property, and buy it, not in his own name, but in the name of someone else the sale would be void.

"Profits made and advantages gained by the agent in the execution of the agency belong to the principal. And it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent, if it be the fruit of the agency."

Patents for inventions made by the agent, even though made during the agency, and even though the agent's attention to the matter was the result of the knowledge or information acquired in the principal's business, are not regarded as a fruit of the agency, and the principal cannot have, them merely as the result of the relation.[1]

26. An agent cannot appoint a subagent unless he is authorised to do so expressly, or by usage, or by the obvious reason and necessity of the case. Thus, a consignee or factor for the sale of merchandise may employ a broker to sell when this is the usual course of business. A subagent appointed without such

[1] Mechem, § 1214.

authority is only the agent's agent, and not the principal's. The principal, however, may authorise or confirm or ratify the subagent's act, and, when he does, the act becomes his own.

When a note or other obligation is sent to a bank for collection, which it sends to another bank nearer to the place where the debtor lives, is the first bank or immediate agent, or the second bank or subagent, responsible to the owner for any neglect pertaining to its collecting by the second bank? Two rules have contended for recognition. In most of the states a bank that exercises proper diligence and intelligence in selecting a collecting agent to do whatever may be necessary in relation to the collection, is not liable for his conduct. In New York, and a smaller number of states, a bank to which paper is sent for collection is responsible for the negligence of a subagent to which it may be sent. A similar rule has been established by the Supreme Court of the United States.

27. A principal, unless his agent is personally interested in the business, may at any time revoke his authority. His death operates in this manner. But an agent's death does not revoke the authority of a subagent appointed by the agent under an authority given him by the principal. Furthermore, the authority of an agent who has an interest—for example, a person who has authority to sell goods and apply the money to his own benefit—cannot be revoked by the principal, wherever the execution of the agent's authority is needful to make his interest valuable.

On the other hand when an agency is created for

an indefinite period the agent may, on giving reasonable notice, sever the relation at any time without liability to the principal, and is entitled until that time to compensation for his services. When, however, an agency is created for a definite period or purpose, the agent who renounces before the time fixed or execution of the purpose, will be liable to his principal for the damages he may sustain.

28. A general authority may continue to bind a principal after it has been revoked, when the agency was known, and the revocation was wholly unknown to the party dealing with him without such party's fault.

29. As a principal may revoke his agency, so may an agent withdraw at pleasure; there is a limitation on both sides; neither can exercise this power in an unfair, injurious manner that circumstances will not justify. Damages, therefore, may be recovered, should an agency cease in a way that injures the other party.

30. An agent is bound in his principal's affairs to use all the care and skill that a reasonable man would use in his own. He must also act in good faith. He cannot make a profit from his principal for whom he has undertaken to act. But an agent who acts gratuitously, without legal right to compensation for his services, will be responsible for no other negligence than that of a gross character. The varying degrees of negligence have often been the subject of judicial controversy, and it is by no means easy to distinguish between them. The shades are almost imperceptible, and no guide besides the general principle can be

furnished to determine the legality of the acts of an agent in any particular case. It must be left for the consideration of a jury to determine whether the negligence is of a kind, or not, for which he is responsible.

31. An agent should keep an exact account of his doings, especially of his pecuniary transactions. After a reasonable time has elapsed a court will presume that his account has been rendered, accepted, and settled. Otherwise every agent might remain liable on his account. Again, he is liable not only for the balance in his hands, but for any interest that has accrued.

32. An agent represents his principal in receiving information affecting his business. Therefore knowledge acquired by an agent in the course of his business is regarded as the knowledge of his principal. It is supposed that he will inform his principal of everything that will be useful to him; if he does not, nevertheless his principal is regarded as having gained the information from him, because he is acting as his principal's servant, and the law assumes he is doing his duty. At all events, if he is not, of two innocent persons who must suffer, his principal, who has appointed him, must be the loser through any failure of the agent in duty.

33. The law concerning notice or information given to an agent has a very wide application. Notice to an officer or member of a corporation is regarded as notice to the corporation whenever, either by appointment or usage, he had authority to receive it. Not in all cases, though, is notice to a member of a corporation notice to the corporation itself. Many cases have

occurred in which the question has arisen whether or not an officer held such a relation to a corporation that information to him should be regarded as a notice to the corporation of which he was an officer or employee. Thus, information to the cashier of a bank concerning the protest of a note, for example, would unquestionably be considered notice to the institution; but such information conveyed to a director would not be considered notice to the institution, for the reason that it is not within his province or duty to attend to such matters. Many questions of this kind concerning notice arise in business. The tendency of the law is not to widen the province or duty of officers to convey information to the institutions with which they are connected, and the reason is very sound—their duties might become too burdensome.

There is a pretty clear line between advisory officers and those whose duties are of an active character. The general officers of an institution, those who are employed in its actual management, are clearly held accountable for all information touching the business of the institution they represent, and information conveyed to them is regarded, and properly so, as information conveyed to the institution itself.

34. An invasion of this rule occurs whenever the agent's interest is opposed to that of his principal; the law assuming that the agent will then be silent. This rule is frequently applied, especially in transactions wherein the agent is deeply concerned in perpetrating a fraud.

Thus, a depositor receives his bank-book, and his

checks and other vouchers, from the bank. The depositor looks them over on their return from the bank, and supposes they are correct. In ordinary cases such action on the part of a depositor would prevent him from making reclamation upon the bank on the discovery of his secretary's fraud or mistake, should he neglect to do so after a reasonable period. Should it appear, however, that his secretary has committed a fraud on him by forging checks and, on the return of the book, has stolen some of them or so changed them as to make an examination by the depositor fruitless, then in some states he would not be precluded from recovering against the bank on the discovery of the truth, for the simple reason that the conduct of his agent would not be binding on himself. But in other states it has been held that a depositor should examine his pass-book himself, and if instead of doing so, he delegates the duty to another, he is responsible for the consequences.

Again, an agent who represents two principals and concocts a scheme against one of them is presumed to have made no disclosure of his intention to the other principal. An independent fraud committed by an agent on his own account is beyond the scope of his employment and is analogous to a fraud wilfully commited by the servant for his own purposes, and not as a means of performing the business entrusted to him by his master.

The treasurer of a corporation was also vice-president of a bank and its general manager. As treasurer of the corporation he made two promissory notes which

were discounted by the bank and credited to the corporation. On the same day, as treasurer, he drew a check and charged the amount to the corporation on the books of the bank. With the proceeds of the check he purchased two drafts of the bank drawn by him on its New York correspondents, signing them as vice-president of the bank and drawing them to his own order. He received payment of the drafts in currency, and used the proceeds for his own private purposes. Subsequently, the bank sued the corporation on his promissory notes and recovered, the court holding that, in thus acting as treasurer, he kept within his authority, and the corporation was liable for the loss.

35. Passing from the effect on a principal of notice conveyed to him through his agent, we may inquire into the effect, on him, of a fraudulent representation made by his agent in conducting his business. Though he may be personally ignorant and innocent of the wrong, he is liable and cannot retain any benefit from his agent's representations. And whenever he does retain the benefit he cannot disavow the representations, and shield himself behind the plea that the person was not acting for him. By retaining the fruit of his agent's act he becomes responsible for the act itself.

A principal is also liable for a material representation made by his agent which he believes is true, but which the principal knows is false and does not correct. A sale made under such circumstances may be avoided by the buyer.

36. Though a principal may be responsible for the

deliberate fraud of his agent in executing his employment, he is not responsible for his criminal acts, unless he expressly commanded them. But there are occasions on which he has entrusted property to his agent who has used it illegally, yet rendered his principal liable criminally without proof of direct participation in the act; for example, in smuggling goods.

37. Once it was considered that an agent of a corporation who did a criminal thing was, indeed, responsible therefor, but not the corporation itself, because it was not capable of doing an immoral thing. It's nature was peculiar; it was not endowed with a moral quality. But the law has long since seen the necessity of regarding a corporation in a different light, and the wrongful acts of its officers are often visited on the institution itself. For example, an officer of a bank has no right to lend more money to a customer than the law prescribes, or to take security that is forbidden; nevertheless, if a bank receives the benefit of his act, it is punishable therefor, and the good of society requires that this should be done. Consequently, for all the acts of this character that are done with the intention of benefiting the institution, although they are not within the legal scope of an officer's authority, the institution itself is responsible.

Every agent is entitled to indemnity from his principal when he acts in obedience to lawful orders, or when he does an act that is not wrong in itself, which he was induced by his principal to regard at that time as right.

38. An agent cannot disregard the instructions of

his principal without making himself liable to him for the consequence. In ascertaining or defining the extent of his instructions, custom or usage often has great influence, because, on the one hand, an agent is entitled to all the advantages usage gives him, and, on the other, a principal has a right to expect that his agent will conduct himself in harmony with the usages of his business. But usage never prevails over express instructions. A principal who accepts the benefit of an act performed by his agent beyond his instructions relieves his agent from responsibility therefor.

39. Again, goods purchased through fraud and in the principal's name, as a means for deceiving creditors, may be taken and sold for the agent's debts. But the principal, by affirming his agent's acts, may make the goods his own despite his agent. And he may repudiate the purchase of goods bought without his authority, and yet hold them as security for the money advanced or paid by his agent.

40. Generally, an agent may make himself liable by his agreement, or by going beyond his authority, or by going differently, or by concealing his character as an agent, or by his own bad faith. If an agent should execute an instrument that would hold him personally, he cannot clear himself by showing that, in fact, he signed it as agent, which was known to the other party. The reason is, this would vary the terms of a written contract by oral evidence, which the law will not permit to be done except in cases of fraud, accident, or mistake. To permit this generally would destroy the certainty of written contracts.

41. The principal of an agent who embezzles, or wrongfully takes his employer's goods, may recover or reclaim them if they can be traced and identified. If they become blended with the agent's own goods and he should die or become insolvent, his principal could claim only as a common creditor.

42. An agent who exceeds or disregards his authority, and this is known by a person dealing with him, cannot be held personally liable; if not known, the agent is liable on the whole contract, although he may have authority to execute or perform only a part of it. A person who has no authority, and acts as agent, is personally responsible. But an agent who should exceed his authority ignorantly would not be personally liable except to an innocent party dealing with him, who would otherwise suffer loss.

CHAPTER XII

CONTRACT OF SALE

1. Only the owner of goods can sell them.
2. Illustration of this principle.
3. Negotiable paper is an exception.
4. To make a sale there must be an agreement by competent parties.
5. Delivery is not essential to constitute a sale.
6. But the thing sold must be identified.
7. The difference between a sale and an agreement for a future sale.
8. An illustration of the principle.
9. A contract for a future sale does not become a sale at the time for its performance.
10. There can be no sale of non-existing goods.
11. The ownership of things is not changed by unperformed conditions.
12. The law presumes that payment and delivery are to follow a sale; if they do not either party may regard the contract as ended.
13. Or, as alive, and either party may enforce it.
14. What the seller can do when the buyer refuses to take the goods.
15. The rule concerning goods sold at public auction.
16. The sale of copyrighted goods.

17. What is a sufficient delivery.
18. What must be done when an actual delivery cannot be made.
19. Delivery of timber.
20. Delivery of portable articles.
21. Sale and delivery of things at sea.
22. A delivery of a fixed quantity is not completed by a tender of a bill of lading for a larger quantity.
23. When delivery is a fraud to prevent creditors from taking the goods, and what rights are acquired by an innocent purchaser.
24. Until delivery, what care the seller must take of them.
25. When their delivery is complete in a store they are kept at the buyer's risk.
26. They must be sent as the buyer directs.
27. The seller has a right to retain them until the price is paid.
28. When the seller loses his lien he cannot recover the goods.
29. But he can stop them during transit if the buyer becomes insolvent.
30. What the buyer must do when goods are defective in quantity, quality, etc.
31. Effect of a clause in a contract providing for mistakes in quality, etc.
32. What the buyer must do when only some of many things are delivered.
33. The same subject.
34. Effect of the denial of the existence of a contract of sale after it has been partly performed.

35. An illegal contract of sale cannot be performed.
36. Effect of fraud in making sales.
37. A buyer may cancel a contract when fraud has been practised on him.
38. A defrauded seller may sue for his loss.
39. What is a waiver of a right to cancel it.
40. Fixing prices of goods for dealers.

1. A PERSON cannot sell a thing he does not own. If he has merely the right of possession to goods, has hired them, or has possession only, as in the case of stolen or found goods, he cannot sell them and give a good title against the owner. And if he pretends so to do the owner can recover them from the purchaser, though he was wholly ignorant of the seller's defective title at the time of purchasing. In other words, only a person who has a right to merchandise can sell it, because the sale must transfer the right of ownership from the seller to the buyer.[1]

2. Thus, a contract was made with a farmer for the use of a yoke of cattle for one year; at the end of that period they were to be returned. The hirer also had the privilege to pay a price named and keep them. As the cattle were sold during the year by the keeper or bailee without paying the price, the sale did not pass the title, and the owner could reclaim them.

3. Negotiable paper is an exception to this rule. Whenever this is transferable by delivery a purchaser in good faith acquires a title thereto, even though he has bought it of a thief, or of a finder. But the owner

[1] For form of bill of sale see Vol. VI, Appendix, No. 9.

only of all other things can legally part with them, and a thief or finder who should attempt to give a good title would fail, and the true owner could recover them. An owner, however, who sells a thing, although he was deceived and induced to do so through fraud, cannot reclaim it from another who, in good faith, bought it from the defrauder.

4. Assuming that the possessor of goods is their owner, and competent to sell them, what must he do to accomplish this purpose? He must agree with another competent party for the transfer of their ownership from himself to the buyer for a fixed price. If the ownership be transferred the goods are sold; if the ownership be not transferred they are not sold. The completion of the sale does not depend on their delivery by the seller, or on the payment of the price by the buyer, but on a change of ownership. By the mutual assent of the parties the buyer immediately acquires the ownership of all the rights and liabilities of ownership, so that, should any loss or depreciation of the articles purchased occur, the buyer would be the sufferer. On the other hand, he would be the gainer by any increase in their value.

5. The parties may expressly agree to the giving of a credit that will bind the seller, or this may be inferred, or implied, from usage or from circumstances. The delivery and acceptance of goods, or the payment of money for them, or a receipt from a seller of what is known as earnest money, are acts from which courts are justified in inferring that a sale has been effected. But neither delivery, nor earnest money, nor part pay-

ment, is essential to the completion of a contract of sale. This is the common law, which has been somewhat changed by the statute of frauds, as we have already learned.

6. When a sale relates to an entire thing no question can arise concerning its identity. But when it forms part of a general mass a sale is not complete, and no ownership is transferred, until the thing sold is separated, ascertained, or identified. Thus, D bought of H 300 barrels of oil that were to be delivered "on first water," and paid the purchase money for it. He pointed to a large quantity of oil, and requested D to select the quantity he had purchased. He went away without selecting or separating the quantity purchased. A flood afterward swept away all of H's oil, and D afterward demanded delivery of the 300 barrels he had purchased, which H refused to deliver. It was decided that the sale had not been completed, and consequently that no title to the oil had passed to D.

7. The difference between a sale and an agreement for a future sale may now be considered. Every sale is a complete or executed contract, although there may be no payment or delivery of the thing purchased. But the contract itself is complete; nothing remains unfinished. An agreement for a future sale is a contract to sell, which is to be executed or carried out at a future time, and is called an executory contract, in distinction from a sale, which is an executed or completed contract. A sale is completed by a transfer of the ownership of specific goods or other things; *to complete* an agreement for a future sale, the thing

forming the subject of the contract must always be *delivered* and, in some cases, though not always, accepted.

8. An illustration of an executory contract, or agreement for a sale, may be given. A contracted to sell to B a quantity of leather that was then in vats in the process of tanning. The hides could have been removed at the time of making the contract. They were to be delivered, however, about three months afterward. It was decided that no immediate ownership in them passed to the buyer, and that the leather belonged to the seller, and could be taken by his creditors. This was declared to be so notwithstanding the fact that it had long been the course of business for curriers to purchase leather of tanners while it was in the process of manufacture, which was to be delivered when the tanning was completed, and that advances were frequently made on such purchases. Justice Gibson declared that an agreement for a subsequent delivery was essentially executory. The property in an article made to order passes only by its delivery, because, at the time of ordering it, there is no property in anything to pass; the accidental existence of a part of the thing at the time does not give the customer a specific right to the whole.

9. A contract for the future sale of a thing does not, on the arrival of the time for executing it, or happening of the event mentioned, become a sale, transferring ownership. The buyer does not then acquire it, and cannot, by tendering the price, ac-

quire a right to the possession; he may tender the price, or do whatever his obligation requires, and then sue the owner for not observing his contract and delivering the machine or other thing, but the ownership of the article is still that of the original owner.

10. For the same reason that the subject of a sale must be in existence, the ownership of goods that have no existence at the time of their sale cannot be transferred. Thus, in contracts for a sale of articles that are to be manufactured, as the subject of the contract is not in existence when the parties made their agreement, no ownership passes until the thing to be manufactured is completed, and has been delivered and accepted by the person giving the order.

11. One's ownership of a thing is not changed by a sale and delivery on conditions that are to be performed afterward but which are not; but is changed when the delivery is absolute and the bargain is perfect, or can be made so by reference to something else. For example, it is certain enough when the price can be obtained by mere computation. Therefore, a sale of a large raft for so much per thousand feet and delivered to the buyer, changed the property, though the computation was not made.

12. The law presumes that a sale is to be followed immediately by payment and delivery, unless the parties shall otherwise agree. In other words, the law supposes that the seller intended at once to deliver, and the buyer, in like manner, to pay for the goods purchased. If, therefore, the buyer departs without pay-

ing or tendering the price, the seller may consider that there has been no sale; and, consequently, should the buyer come at a later period, and offer the price and demand the goods, the seller could refuse to part with them. Or, if the person to whom the offer of sale is made accepts the offer, but still refuses or neglects to pay the price, and there are no circumstances indicating a credit or justifying the refusal or neglect to pay, the seller may disregard the acceptance of his offer. It would, however, be a proper thing for the seller to demand payment of the price before he treated the sale as void, and a refusal to pay for the thing sold would then give him at once a right to regard the goods as his own. Should the seller unreasonably neglect or refuse to deliver the goods sold the buyer would thereby be justified in supposing that no sale had been made, or that it had been annulled or avoided.

By the uniform sales act "the price may be payable in any personal property." When the price is not fixed and a reasonable one must be paid and accepted, the act declares that "what is a reasonable price is a question of fact dependent on the circumstances of the case."

13. Neither party is required to act thus in consequence of the refusal or neglect of the other. As a sale actually has been made, the seller may sue the buyer for the non-payment of the money due to him, or the buyer may sue for the non-delivery of the merchandise. Either party has an election of this nature that he can exercise. He may consider that

the contract is ended by the neglect of the other party to do what is required of him, or he may regard the contract as alive, and seek to enforce it.

Unless a different intention appears, the following rules have been prescribed in the sales act for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

(1) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in them passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

(2) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

(3) When goods are delivered to the buyer on approval or "on sale or return," or other similar terms, the property therein passes to the buyer.

(*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

(*b*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the

expiration of a reasonable time, which is a question of fact.

14. Should the buyer neglect or refuse to take the goods and pay the price within a reasonable time, the seller can resell them, and give notice to the buyer that he looks to him for the deficiency, if there be any, from the failure on his part to take the goods and pay for them. In making such a resale the seller acts as agent or trustee for the buyer, and his proceedings will be governed by the rules that relate to persons acting in such a capacity. One of these is that he must use due care and diligence, and act in perfect good faith. And again, the receipt of money after the time for delivery, on account of the contract, will not prevent the seller from recovering for the loss he has sustained. In a case involving this principle the court remarked that a resale was the usual mode of ascertaining the difference between the contract price and the value of the article when the buyer refused to accept it. But it is not the only mode. The law has no single mode for settling the value of an article in the market at a given time.

15. The owner of goods sold on credit at public auction, but which the buyer refuses to take, can maintain an action in his own name against the buyer, before the credit has expired, for not observing his contract. The damages or sum that may be recovered is the difference between the price that was to be paid and their value at the time of the buyer's refusal to take them. This may be ascertained by a resale

at the buyer's risk, but some other mode of estimating the value of the loss may be adopted.

16. Important questions sometimes arise concerning the restrictions on sales of goods that are resold. How far are the restrictions binding on the secondary purchasers, especially when they know nothing about them? This question arises the most frequently after the sale of copyrighted goods, the secondary purchaser seeking to escape from the restrictions that bound the seller. It has been decided that a stipulation, in a contract for the sale of a proprietary medicine sold under a registered trade-mark, that the purchaser shall not sell it for less than a specified price, does not follow the medicine into the hands of a subsequent vendee, and he cannot, therefore, be prevented by the manufacturer from selling at less than the stipulated price, although he knows that the manufacturer sells only at that figure.[1]

This rule is founded on the principle that a restriction on the right of the owner of personal property to sell or use it does not run into the hands of a purchaser from him, whether he knew of the restriction or not. In other words, a covenant concerning personal property binds only the maker and his personal representatives, and does not run with the property like covenants relating to land.

One who purchases a copyrighted article, therefore, from the absolute owner may sell or use it exactly as he pleases so far as the copyright law is concerned, notwithstanding any restriction attempted to be im-

[1] Burdick on Sales, § 316.

posed on the vendee; but if he purchases from one who is a mere agent for the sale of the article, the restriction is binding on him. But if an agent has agreed to sell under certain instructions, which are unknown to his customers, they are not bound by them; the wrong is that of the agent who alone is responsible.

Again, should the owner of a copyright transfer the title covered by the copyright to damaged books, by an agreement whereby the books are to be used as paper stock only, the seller cannot, by virtue of the copyright statute, restrain the sale of such books by the purchaser in violation of the agreement.

17. What is a proper and sufficient delivery of goods sold is not always an easy question to answer. In general, it is sufficient whenever they are placed in the buyer's hands, or in his actual possession, or whenever action is taken that is equivalent to a transfer of possession. Thus, after landing goods on a wharf alongside of the ship that brings them, and notifying the buyer, this is sufficient delivery. Usage is often of the utmost importance in determining the true answer. In general, a delivery is sufficient that puts the goods within the actual reach or power of the buyer with immediate notice to him, so that there is nothing to prevent him from taking actual possession of them.

18. When from the nature or situation of goods an actual delivery is difficult or impossible—for example, timber floating in a boom-slide—such acts as touching it, or going near and pointing it out, complete the delivery.

19. Once a contract was made for the delivery of

timber of a particular description that was delivered, but never completely accepted, because it was defective. It was decided that the buyer should have offered to return the timber soon after the deficiency was discovered; or, at least, within a reasonable time after the discovery, should have given notice of his intention of not accepting it. If this is not done, and the timber is carried off by ice or other accident, the seller may recover its value.

20. In delivering portable articles, neither time nor place of delivery having been mentioned, the rule is, they must be delivered at the place where they are at the time of the sale—the store of the merchant, the shop of the manufacturer or mechanic, or the farm or granary of the farmer where they are kept. When a time for delivering them is fixed by the contract, the seller must seek the buyer at his residence, and there tender the articles. If they are heavy or cumbersome the seller must seek the buyer a reasonable time before the day of delivery, and ask him to appoint a place for delivering them.

21. On the sale of things at sea an endorsement and delivery of the bill of lading or other instrument is sufficient to complete their delivery, and the buyer, in like manner, can transfer them to another by his own endorsement and delivery of the bill of lading. The seller should send or deliver the bill of lading to the buyer within a reasonable time: and his refusal to do this has sometimes justified the buyer in cancelling the sale.

22. A delivery of a fixed quantity of merchandise

is not completed by a tender of a bill of lading for a larger quantity. If anything remains to be done—for example, separation from a larger mass before it can become the property of the other party—there can be no tender or delivery until after the separation has been made. The ownership of the thing tendered is transferred to the person to whom the tender is made whenever he is under an obligation to receive it.

23. The question of delivery is sometimes important from another point of view. Not infrequently goods are sold by persons who are on the verge of bankruptcy in order to prevent them from coming into the possession of their creditors, who, notwithstanding, keep them as if no sale had been made. As goods are usually transferred soon after they are sold, when this is not done, the transaction is generally regarded as a fictitious sale for some unlawful purpose like that just mentioned. In such a case, should a third party without knowledge of the sale purchase the goods from the seller, he would gain a valid title by acquiring possession of them, and could hold them against the other pretended purchaser. Again, unless delivery or possession accompanies the transfer of the right of property, the thing sold may be taken by the creditors of the seller. In other words, while he retains possession of his goods, he is regarded ordinarily as the owner, and they may be taken by proper legal proceedings by his creditors. His retention of them may be explained, and if this be perfectly consistent with honesty, and especially if the delay in transfers-

ing their possession was brief, the title of the first buyer would be respected.

24. Until a delivery of goods has been made the seller is bound to keep them with ordinary care. Having observed this, he is not liable for any loss or depreciation, unless arising from some defect that he had warranted did not exist. Thus, A sold a quantity of beef to B, who paid the purchase money. It was agreed between them that the beef should remain in A's possession until it was sent to another place. Some time afterward B received a part that proved to be bad, and an inspection disclosed the unfitness of the entire quantity. The court decided that, as the beef was good at the time of the sale, the buyer must bear the loss.

25. Sometimes goods are sold in a shop or store and put into a parcel, or otherwise made ready for delivery to the buyer in his presence, and he requests the seller to keep them for awhile. In such a case the property in them passes, and the seller becomes the bailee, or keeper of them for the buyer. Consequently their loss, while in the seller's possession, without his fault, would be the buyer's.

26. The seller must send the goods in the way directed by the buyer. Having complied with the seller's direction and exercised ordinary care over them until their delivery to the agent of the carrier, the seller's responsibility is ended as completely as if they had been put into the hands of the owner.

Should the buyer neglect to give directions the goods must be sent in the ordinary way, or as usage has

determined. Generally, customary and proper precautions should be taken to prevent loss or injury in transporting them. If this is taken the goods are sent at the buyer's risk, and the seller is not responsible for any loss. But he is responsible should any loss or injury happen in consequence of neglecting to take such care or precaution. Should he send them by his own servants, or should he carry them himself, they would be in his possession and at his own risk until delivery.

27. A seller has a right to retain possession of goods sold, unless they are sold on credit, until the price is paid. This right is called a lien, which means a right to retain possession of them until some charge on them or some claim against them is satisfied. But he loses his lien whenever he voluntarily parts with their possession, or by their delivery to another. Furthermore, the delivery of a portion is regarded as a delivery of the whole; or a symbolical delivery—for example, the delivery of the key of a warehouse in which goods are stored—transfers the right of possession of them to the buyer.

28. As the seller, by delivering goods to the buyer, loses his lien, so, he cannot afterward retake and hold them, should the buyer fail to pay for them as he has promised. He can, though, by agreement, retain his ownership. At the time of delivering them, if the buyer agrees that the seller's ownership shall be preserved until he has paid for them, the agreement would be valid, and the seller could reclaim his goods, if he desire, *from the buyer*.

29. While goods are in the possession of the seller or of his agent, or are in transit from him to the buyer, he has a right to refuse or stop their final delivery on learning that the buyer is in failing circumstances. This is an old rule of law, and the reason for it is plain. It is to save the seller from loss. Why should he deliver his property to an irresponsible person, or to one who is unable to pay for it? The law does not require him to do so unreasonable a thing.

What is insolvency? If the buyer has by his conduct in business afforded "the ordinary apparent evidence of insolvency," has permitted his commercial paper to be dishonored, or his property to be attached and judgment rendered against him without contesting the action, in such a case the seller is not obliged to let his goods go into the actual possession of the buyer and be appropriated to the payment of the debts of others.

30. A buyer who knowingly receives goods so deficient or so different from what they should have been that he might have refused them waives the objection, and is liable for the whole price unless he can show a good reason for not returning them, as in the case of materials that are innocently used before discovering their defects. Thus, a man bought a chandelier that was warranted sufficient to light a room of defined dimensions. After keeping it for six months he desired to return it and refused to pay for it. The court declared that he had kept it too long, although it was not sufficient for the purpose, and not as good

as the warrant specified. Sometimes two or three months, or even a shorter period, is regarded as too long to permit a return of the thing purchased. How long it may be kept must depend largely or principally on the nature of the thing and the use that is to be made of it. Though the buyer cannot return it, yet, when the price is demanded, he may set off the injury he has sustained by reason of the seller's failure to fulfil his promise. The seller, therefore, cannot recover the entire price, but only the value of the thing sold to the buyer. But a long delay or silence may imply that the buyer has even waived the right to demand a reduction.

31. In a contract of sale there is sometimes a clause providing that a mistake in the description, or a deficiency in the quality or quantity, shall not avoid the sale, but only give the buyer a right to make a deduction or to demand compensation. Nevertheless, a great mistake or defect, affecting materially the availability of the thing for the purpose for which it was bought, would render the sale void, because the thing sold is not the thing the buyer desired and which ought to have been furnished. Of course, it is not easy to determine this mistake or defect, or what must be regarded as a non-compliance with the contract so far as to justify the buyer in refusing to receive the goods. Like many principles of law, while the principle is clear enough, its application must depend on the facts in each case.

32. On some occasions many things are ordered at one time and by one agreement. In such cases

generally, the buyer may refuse to receive a part without the rest, but, if he accepts any of them that is severed from the rest he will be regarded as having given a separate order for each thing, and is required to receive them as they are tendered, unless some distinct reason exists for refusing to receive them. The purchase of each thing at an auction, by different bids, and especially after marking the name of the buyer against each thing, is regarded as independent of the others. But the buyer of several things related to each other, no one of which would have been bought without the others, is not obliged to take one or more unless he can have all. The question whether it is one contract, so that the buyer shall not be bound to receive any one thing unless all of them are tendered to him, must be determined by ascertaining from all the facts whether the things belonged together. Should the conclusion be reasonable that no one thing would have been purchased without the others, then they must be taken together, otherwise each thing may be regarded as purchased separately. The buyer may have, by the terms of the contract, the right to redeliver the things purchased. For it is often agreed that the purchaser may return the goods purchased within a fixed or reasonable time. He may also have the right to return them if they prove to have, or not to have, certain qualities, or on the happening of a specific event. In such cases the buyer must prove that the circumstances existed that justified him in returning the things purchased. Furthermore, in such cases, the property in the things purchased passes at

once to the buyer as in ordinary sales, subject to his right to return them, given to him by the agreement. If he does not exercise this right within the agreed time or within a reasonable time, should none be fixed by agreement, the right to return them is wholly lost; the sale becomes absolute, and the price of the goods may be recovered. Again, if, during the time the buyer has them in his possession they are so misused as to impair their value, he cannot tender them back, and is liable for the price.

33. If a contract for the delivery of lumber, for example, be an entire one, the party who is entitled to it may accept a partial performance, and the contractors have a right to recover for the lumber thus delivered. On the other hand, if the remainder is not delivered the buyer may set off his loss or damage occasioned by the non-fulfilment of it.

34. When two persons enter into a contract, and, after a partial performance by one of them, the other denies its existence and gives notice of his intention to disregard it, the other party may, at his option, perform it fully and enforce it, or consider it at an end and recover for what he has done.

35. As the law does not require anyone to do a forbidden thing, no contract can be enforced that is illegal or contrary to law, or that is tainted with illegality. When, however, the illegal can be separated from the legal parts, this may be done. Thus, should a person agree for a thousand dollars to sell and deliver a quantity of merchandise and also to assist the buyer in some contemplated fraud, he would

be bound to sell and deliver the goods because the consideration was legal and this part of the promise also, but he could not assist in the fraud, because this part of the promise was illegal.

36. Fraud vitiates and avoids in law every contract and every transaction. Consequently, an unlawful representation by which a sale is effected, or a purchase of goods with the expectation of not paying for them, or hindering others from bidding at auction by wrongful means, or selling at auction and providing bybidders to increase the bid, or selling "with all faults" and then purposely concealing and disguising them, will avoid a sale. No title or right passes, and the innocent party, whether buyer or seller, may insist that the fraudulent party shall not take advantage of his own fraud to avoid the sale. On one occasion a man advertised a ship for sale at auction with all faults, but purposely put her in a position where an important fault could not be easily detected. This act avoided the sale.

37. A buyer on whom a fraud is practised has a right to cancel the sale, but he must do this within a reasonable time after discovering the fraud. The delay must be brief unless he can show a good excuse.

38. On the other hand, a defrauded seller may cancel the sale and sue for the price of the thing sold. If, however, the fraudulent buyer gets the goods on credit, and the seller sues for the price of them before the credit expires, this is a confirmation of the sale, including the terms of credit. Consequently, he thereby waives the right to cancel the sale, and he has

no right to demand the price until the period of credit has wholly expired.

39. Whenever a party who has been defrauded by any contract brings an action to enforce it, this is a waiver of his right to cancel it, and is a confirmation of the contract. One may inquire, what then ought to be done in such a case? Plainly, he should sue to recover for the injury he has sustained, but he ought not to recognise the contract itself.

40. Attempts have been frequently made by manufacturers and others to maintain the prices of their products, by making contracts with jobbers to whom they are sold, that they shall not be resold at less than stated prices. Their object in doing so is to escape the Sherman and Clayton acts, aimed against restraints in trade, or monopolies. One method is to control resale prices by agreeing to give rebates to those dealers only who are willing to maintain the stated prices, yet are under no obligation to do so. This method has been upheld. Another method involves no contract, and consists simply in stating resale prices and refusing to sell goods to any dealer who disregards them. No rule can be deduced from the many cases that have been reported, the highest court declaring that their decision must turn on the answer to the inquiry in every case—which is one of fact—whether the acts have been violated or not.[1]

[1] United States v. Beech Nut Co., 257 U. S. 441; United States v. American Linseed Oil Co., 262 U. S. 371; Cement Manuf. Pipe Assn. v. United States, 268 U. S. 586.

CHAPTER XIII

WARRANTY

1. Sales with an express warranty.
2. Illustration of a warranty.
3. What language or conduct is a warranty; estimates.
4. A warranty may be expressed or implied.
5. The law does not imply a warranty from a full price.
6. How the law regards the vendor's superior knowledge.
7. Affirmations of quantity and quality.
8. A mere representation is not a warranty.
9. Illustration of the principle.
10. Adulteration.
11. There is an implied warranty by the vendor of title.
12. Also in kind with the commodity sold.
13. Also that goods are like the sample.
14. Also of a thing supplied for a special purpose.
15. Is a bill of sale a warranty that the article conforms to the description?
16. The rule concerning provisions.
17. When the buyer can return the goods sold with a warranty.
18. What affirmation is a warranty.
19. The sale of one's business.

1. Next may be considered sales that are made with a warranty. By this is meant a statement of some kind that forms a part of the contract. A warranty may be general, or particular and limited. A general warranty does not extend to defects that are known to the purchaser, or that are open to inspection and observation, unless the purchaser at the time is unable to discover them readily, and relies rather on the knowledge and warranty of the seller.

2. A contract to deliver iron, for example, made in a particular place, in consideration of a sound price that is paid, is fulfilled by delivering iron made there which the party believed was good, though on trial it proved to be positively bad. The court remarked, in a case of this nature, that the buyer was evidently content, at the time of making his contract, to take his chances that the iron would be of good or bad quality, provided it were made of metal selected honestly for that purpose from the place mentioned. By way of additional illustration, a sale was made of a number of kegs of lard grease, a part of which was inspected by the purchaser before making his purchase. He declined to examine more. He received a bill of sale in which the article was invoiced or described as lard grease. There were no false representations, nor was any deceit practised, nor did the seller know of any defect in its quality, although a portion proved to be of an inferior quality. Nothing could be recovered.

3. On the sale of a quantity by estimation, and without deception, each having equal means of judgment,

the vendor cannot recover, should the quantity prove to be less than his estimate, or the seller, should it prove to be more. "After the funeral has passed the dead cannot be resurrected."

4. A warranty may be either express or implied. "Any affirmation," says Beach, "of the quality or condition of the thing sold, made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty."

An implied warranty is created by law—for example, that the possessor of goods who offers them for sale as his own has a title to them.

5. The law generally does not imply a warranty from the fact merely that a full price is paid.[1] The maxim of the law "caveat emptor," let the purchaser beware, prevents this. As a general rule, mere silence on the seller's part is not fraud; but, if the usage of trade requires that a declaration of defects should be made whenever they exist, his silence is regarded as a warranty against them. Simple declarations of opinion are not a warranty.

6. There is a marked tendency to depart from this rule in sales or articles of which the seller is presumed to have a knowledge superior to that of the buyer—*e .g.,* jewels, medicines, and the like. "In this class of cases, the buyer and the seller do not deal on equal terms. The vendor is professedly an expert."

The law of caveat emptor (let the purchaser be-

[1] Except in South Carolina and Louisiana.

ware) is narrowing by legislation designed to protect the buyer. The sales act declares (1) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and the buyer relies on the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. (2) Where the goods are bought by description from a dealer who deals in goods of that description there is an implied warranty that the goods shall be of merchantable quality. (3) If the buyer has examined the goods there is no implied warranty of defects which such examination ought to have revealed. (4) In a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty of fitness for any particular purpose. (5) An implied warranty for a particular purpose may be annexed by the usage of trade.

An unqualified sale of goods by the possessor implies their warranty of title; if sold without authority, the buyer may surrender them and recover his money.

7. Affirmations of quantity or quality that are made during negotiations for sale, to effect that end, which are successful, are a warranty. Thus, in New York, a representation was made by a seller that his flour was superfine, or extra superfine in quality, and worth a shilling more a barrel than common flour. To this statement the seller added another: that the buyer might rely on his representation. This was regarded as a warranty of the quality of the flour. In another case the seller or vendor of a horse said to the buyer,

"You may depend that the horse is perfectly quiet and free from vice." This was regarded as an express warranty.

8. A mere representation is not a warranty. The relation between buyer and seller is not confidential. If the buyer, instead of requiring an explicit warranty, chooses to rely on the opinion of one who knows no more about the matter than he does himself, he can only blame himself for any loss that he may consequently sustain. In a case in which this principle was applied a buyer sought to recover for a loss occasioned in the purchase of coal. It was purchased at a price somewhat less at that time than that of first-class coal. The buyer complained that it contained an unusual percentage of slate and dirt, but the court declared that he got substantially the kind of coal for which he bargained. On another occasion an action was brought on a warranty by the purchaser of some goods that had been represented as fit for the China market. He produced a letter from the seller saying he had goods fit for the China market that he offered to sell cheap. The court declared that such a letter was not a warranty, but merely an invitation to trade, and that it had no specific reference to the goods actually bought by the buyer.

9. In one of the cases it was remarked that, if mere representations were to be treated as part of the contract, it would not be easy to see why they should not be thus treated in all contracts, and if they were the law would foster a spirit of litigation by encouraging every man who was disappointed in the

advantage expected from a bargain to drown his sorrows by an appeal to the law. The law gives reparation for broken contracts, but it does not attempt to satisfy mere expectations. It is especially important that this should be the rule respecting representations of the quality of the goods sold, for there is nothing on which both are more apt to differ and less apt to trust each other.

10. An adulteration which is only partial, and does not destroy the distinctive character of a thing, is not sufficient ground, usually, for setting aside a contract of sale; and a buyer is bound by the bargain. In doubtful cases the test seems to be that the article shall be marketable under the name affixed thereto by the seller. A case requiring the application of this principle related to the sale of teas. It was proved that they had been adulterated, but it was also proved that no teas of the same name or denomination were entirely free from adulteration by an admixture of leaves. The court remarked that, if a small degree of adulteration were permitted to affect the question of specific character, there would rarely be a binding sale. Wines are constantly adulterated with brandy, and brandy itself passes in the market, although often adulterated with alcohol. Drugs, chemicals, paints, dyestuffs, and a countless number of other commodities are constantly purchased by dealers or commissioners while knowing that they are not entirely free from admixture. Adulteration may be carried so far as to destroy the distinctive character of the thing altogether, and in doubtful cases there is, per-

haps, no particular test except that of its merchantable character. In the case described the teas were resold to dealers at prices not greatly reduced, although they were put on their guard by the buyer's repudiation of the article. The buyer, therefore, was not deceived with respect to the specific character of the teas, however mistaken he may have been concerning their quality.

11. The seller of goods actually in his possession as owner is regarded by the law as warranting his own title by the sale. But this rule does not apply to one who is acting for another—for example, an executor, administrator. or other trustee; or to a public officer. A sheriff knows nothing about the title of goods he may have seized by the direction of a creditor of a debtor.

12. In all sales of goods there is an implied warranty that the article delivered shall correspond in kind with the commodity sold, unless there are facts and circumstances to show that the purchaser took on himself the risk of determining, not only the quality of the article, but the kind he purchased. Therefore, should a person sell, and another buy, an article as blue paint, which is thus described in an itemized bill, this would constitute a warranty that the article delivered was blue paint, and not a different article.

13. Goods sold by sample are warranted to conform thereto in kind and quality, but there is no warranty of the sample itself. Thus, there was a sale of five bags of hops with an express warranty that the others were like the samples. The sale was

in January, and at that time the samples were essentially like the commodity sold. No defect at that time was perceptible to the buyer. In July every bag had begun to spoil by heating. The seller knew nothing of this fact at the time of the sale. The court decided that there was no implied warranty that the other bags or bulk of the commodity was merchantable at the time of the sale, although the market price was given.

By the sales act there is an implied warranty that the buyer shall have a reasonable opportunity to compare the bulk with the sample, excepting some cases. By the uniform sales act the sale may be public or private.

In one of the later cases. in which this principle was applied, a salesman showed a can of corn to a person, who, after examining it, was asked to prove its quality by cooking it himself. On the following day he made an offer that was accepted by the buyer. There was no fraud and no warranty of the quality, and no facts showing that the parties intended that the quality should be precisely like that contained in the can that was examined and tested. Nothing was said or done on either side to give character to the can as a standard of the quality. The court held that it was a standard only of the kind. The court remarked that, so long as a commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty. A commodity that is wholly unmarketable is substantially different in kind from one that is not so. In such case it is not the

name merely that governs, but the fact that it is without market value and cannot reasonably be pronounced of the same kind as the sample.

14. By the sales act a contract to sell, or a sale of goods by description contains an implied warranty that the goods shall correspond with the description. There is no implied warranty or condition as to the quality for any particular purpose of goods supplied under a contract to sell or a sale.

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are brought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

15. It has often been considered whether a bill of sale describing an article sold is a warranty that the article conforms to the description. The law is now well settled that such a description is a warranty. In one of these cases a bill of sale read thus: "H. and Co. bought of T. W. and Co. two cases indigo, $272." The article sold was not indigo, but Prussian blue.

Fraud was not imputed to the seller, and the article was prepared in such a manner as to deceive exclusive dealers in indigo. The court regarded the bill of sale as a warranty that the article sold was indigo. In another case the bill read thus: "Sold E. T. H. two thousand gallons, prime quality, winter oil." The thing sold and actually delivered was oil, and winter oil, but not of prime quality. As in the other case, the court determined that the bill of sale constituted a warranty of the quality of oil. In another case a vessel was advertised for sale as "copper-fastened." This was decided to be a warranty that she was thus fastened as the term was understood by ship-builders and merchants dealing in that kind of property.

16. Finally, it may be remarked that one who sells provisions is always regarded as warranting that they are good and wholesome.

17. If a warranty is defective the buyer cannot return the article sold, unless there be an agreement to that effect, or fraud; he can only sue the warrantor and recover money for the loss incurred. If, however, one orders a thing for a special purpose, known to the seller, he may return it as soon as its unfitness is found out.

18. By the uniform sales act "any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement

of the seller's opinion only, shall be construed as a warranty."

19. Another remark may be added concerning the sale of one's business. In this country not infrequently such a sale is made, the seller agreeing or promising that he will not pursue his trade elsewhere. The contract is void whenever the seller agrees to give up his business and never to resume it again at any time or anywhere, without limitation of space or time, for it is against public interest to permit a man to cast himself out from his business or trade during the rest of his life. But a contract for a proper consideration not to resume or carry on business within a specified time or place is valid. What these limits are have not been clearly defined. A contract not to carry on a business in a specified town, city, or state would undoubtedly be good, even though the contract should exclude the seller from continuing his business in a considerable section of the country.

CHAPTER XIV

COMMON CARRIER; TELEGRAPH; TELEPHONE

1. Carriers are private or public.
2. His responsibility when carrying for another.
3. The lien of a private carrier for his service.
4. Rights and duties of a public carrier.
5. Who are public carriers.
6. A public carrier may perform other duties.
7. He cannot refuse to carry goods without good reason.
8. The carrier must receive them in a suitable way and at proper times and places.
9. To whom he must deliver goods.
10. What is the end of a transit by a railroad.
11. What must be done by a carrier when others claim the goods.
12. He has a lien on them for his compensation.
13. His liability for the loss.
14. What is meant by the act of God.
15. A carrier is liable for the acts of his agents.
16. His liability by federal law.
17. Effect of stipulation concerning nature of merchandise.
18. His liability for the baggage of passengers.
19. If placed under his care.

20. But he may limit his liability therefor.
21. Carrier's duty in carrying passengers.
22. How it differs from his duty in carrying goods.
23. Passengers cannot recover for an injury caused by carrier when negligent himself.
24. Where passengers can, and cannot, recover who stand on platform of street car.
25. A telegraph company is a common carrier.
26. How message must be sent.
27. Secrecy must be observed.
28. Must be delivered or sent beyond the line promptly.
29. Liability for failure of another line.
30. Force of conditions on a message-blank.
31. Reasonable skill must always be used in sending and delivering messages.
32. Payment for message.
33. How telephone wires must be laid.
34. Must afford facilities to all.
35. And at a uniform price.
36. Must serve all in regular order.
37. When a company may decline to serve a person.

1. Carriers are divided into two classes—private and public. A private carrier is one who carries for another from time to time, but does not pursue this employment as a regular business. The contract between him and the shipper is governed by the ordinary rules of law. He is required to receive, care for, and carry the goods in such a manner as he has agreed to do. The bargain may be oral or in writing. He must use such care as a man of ordinary intelligence would take

of his own property under similar circumstances. And for any loss or injury that occurs while the goods are in his charge, arising from a want of care or intelligence, he is responsible. It is said that slight evidence showing a want of care is sufficient to throw on him the burden of accounting for their injury or loss.

2. When goods are carried by a private carrier without any compensation, then he is considered a gratuitous bailee, and the degree of care that he must exercise is very much less. Indeed, the law requires him to exercise only slight care in carrying them. The want of such limited care would be gross negligence, for which he would be responsible.

3. Whether a private carrier has a lien, or not, for his service has not been clearly determined. An eminent authority says that he probably has one. If he incurs expense concerning the goods for sufficient reason and in good faith, he has a lien thereon for such outlay.

4. Having considered the law concerning a private carrier, the rights and duties and responsibilities of a common or public carrier will now be considered. These are very different from the rights and duties of a private carrier, and there are many reasons why they should be.

5. A common carrier, perhaps, should be more carefully defined. An eminent authority has said that one is a common carrier "who undertakes for hire to transport the goods of such as choose to employ him, from place to place." He undertakes the carriage of goods as his business, and this is the principal dis-

tinction between him and a private carrier. Truckmen, trainmen, porters, and all who undertake to carry goods for all applicants from one city or town to another, or from one part of a city to another, are common carriers. So are proprietors of stage-coaches and hackney-coaches. In recent times the business of carrying goods and passengers is largely conducted by railroads and water-transportation companies, including canal companies. Ordinary sailing vessels are sometimes said to be common carriers. The boat lines or river canals are common carriers, and so are ferrymen. A steamboat, generally employed as a carrier, may be used for a different purpose, like towing a vessel out of harbour, and, when this is done, her usual character does not attach to this particular employment. An express company is a common carrier though employing other conveyances to carry their goods. Likewise a sleeping car company by recent federal law.

6. The same person may be a common carrier and also hold other offices or relations. He may be a warehouseman, a wharfinger, or a forwarding merchant. The peculiar liabilities of a common carrier do not attach to any of these offices or employments. Thus, a warehouseman is liable only for the loss of goods that are taken to be stored, if caused by his own negligence. He is not, like a common carrier, an insurer of the goods. A carrier who receives goods to be stored until he can carry them, or who, at the end of the transit, stores them for a time for the safety of the goods or the convenience of the owner, is liable as a warehouseman only while they are thus stored. But,

if he puts them into his store or office only for a short time, and for his own convenience, either at the beginning or the end of the transit, they are in his possession as a carrier. As a general rule, the deposit of goods, in whatever place or building, is secondary and subordinate to carrying them.

7. He must take the goods of all persons that are offered to him. He cannot refuse to receive any without good reason, for, while announcing himself as engaged in this business, he makes an offer to the public that becomes a contract with all who accept it. He may, indeed, demand his compensation, and, should the shipper refuse to pay, decline to carry his goods; nor is he required to carry goods on the offer of security instead of money. So he may refuse if his means of carriage are already fully employed, or if he cannot carry the goods without danger to himself or to them, or without extraordinary inconvenience; or, again, if they are not such goods as fall within his regular business. He is always entitled to his usual charge, but not to an unusual compensation, except for an unusual service.

A carrier cannot be required to transport dangerous articles. He may exercise his option when they are offered to him. Should, therefore, gunpowder, nitroglycerine, and the like be offered, he may impose his own terms in agreeing to transport them.

8. A carrier is bound to receive them in a suitable way and at proper times and places. If he has an office or station he must have proper persons there, as well as means of security. During the transit and

at all stopping places care must be taken of the goods, appropriate to their care. If he have a notice, regular or otherwise, of the need of peculiar care, as "glass, with great care," or "this side uppermost," the shipper is bound to comply with such directions, unless they impose unnecessary care or labour.

The shipper is bound by all reasonable regulations relating to the manner of delivery and entry of parcels, and the information to be given by him of their contents, the rules of freight, and the like; for example, the carrier "will not be responsible for goods above the value of a certain sum, unless they are entered as such and paid for accordingly."

9. Furthermore, he must deliver the goods to the consignee, or to the person appointed by him, and at the proper time and place. And if a person authorised to receive them declines to do so, the carrier must keep them for the owner. In so doing, however, he is no longer under the strict liability of a carrier, but simply that of a warehouseman. He must also keep them for the owner if he has good reason to believe that the consignee is dishonest and will defraud the owner of them. Concerning the time of their delivery, this must be within the proper hours for business. With respect to the manner and place of delivery, this must depend on the nature of the goods and on usage. They should be left, and with such a notice as will secure their early conveyance and safe reception by the owner or consignee. Something also depends on the mode of conveyance. A man may carry a barrel into a house and deliver it to the owner or his

servant; a wagon or cart can go to a gate or into a yard and make delivery. A vessel can go to one wharf or another, and must go to the one that is reasonably convenient to the consignee, or to the one mentioned in the agreement. When delivery is not to the owner personally, or to his agent, immediate notice should be given to the owner. In truth, it may be said that the carrier cannot be made responsible without a notice of delivery to him; on the other hand, he cannot make adequate delivery without a similar notice. Whenever the carrier has a place of delivery, as at a station, the owner must take notice of this; on the other hand, a carrier must regard the direction of an owner who has designated how his goods shall be delivered.

10. Railroads terminate at their stations, and, though goods may be sent by wagons to the houses or stores of consignees, this is not usually done, as the transit by the carrier is regarded as finished when the goods have reached the carrier's station or terminus. Usually the consignee of goods sent by a railroad receives a notice from the consignor when to expect them, and this is so common that it is hardly necessary for the agents of the carrier to give notice to the consignee. But this should, we think, be given whenever it is necessary.

11. It may happen that a third party claims the goods under a title opposed to that of the consignor or consignee. Should the carrier refuse to deliver them to such party, and, in the end, his legal right to them should be established, the carrier would be

liable to him. But the carrier may demand clear evidence of the claimant's title, and, if this be not satisfactory, he may demand security and indemnity. When the evidence or the indemnity is withheld he cannot be held liable for not delivering them to him, unless his better title was very clear, or unless the carrier did not act in good faith or with proper discretion. If he delivers the goods to the claimant the proof by him of a good title is an adequate defence against any action by the consignor or consignee for not delivering them.

12. A carrier has a lien on all the goods he carries for his compensation. While he holds them for this purpose he is not liable for loss or injury as a common carrier, but only for his own negligence. He can recover his compensation by any of the usual means whereby a lien on property can be enforced. If he carries goods for a party who does not own them, by his request, and at the end of the transit the true owner discovers or interposes and claims them, the carrier may recover his compensation whenever he has rendered a service or benefit to the owner for conveying them. But it would be a personal claim only, for which the carrier would have no lien.[1]

13. The liability of a common carrier for the loss of goods is peculiar. It is said to spring from the public nature of his employment, but the true reason is the ease with which he may defraud the owner. Another reason is the owner's difficulty to prove the

[1] 2 Parsons on Contracts, 209.

carrier's wrong. The general rule for the carrier's liability is for any loss or injury to goods under his charge, unless it was caused by the act of God, or by the public enemy. The act of God, so the courts have said in some cases, means the same thing as unavoidable accident. This meaning, though, is not everywhere accepted. It is asserted that the rule is intended to hold the carrier responsible whereever he causes the loss, either by negligence or design. Consequently, the act of God means some act in which neither the carrier himself nor any other man had any direct and immediate agency. If, for example, a house containing goods is struck by lightning, or is blown down by a tempest, or washed away, this is an act of God for which the carrier is not liable. No man could have directly caused the loss. As a grneral rule, a common carrier is always liable for loss by fire unless it was caused by lightning. It might be true that, after the lightning, tempest or inundation, the carrier was negligent and lost the goods which could have been saved by proper efforts, or that he took opportunity to steal them. If this were shown the carrier would, of course, be liable, but the law will not presume this, if the main cause was one of which the carrier could not have been guilty. So, a carrier would be liable for loss caused by robbery, however sudden, unexpected, and irresistible.

14. The act of God may be negative merely; for example, the wrecking of a vessel from a failure of wind. It includes also any loss springing from the inherent nature of the thing, like fermentation or

decay, assuming, of course, that the carrier has taken proper precaution to prevent it.

15. The general principle of agency extends to common carriers, and makes them liable for the acts of their agents that are done while discharging their agency or employment. So, too, the knowledge of a carrier's agent is his knowledge, if the agent was authorised expressly or by the nature of his employment to receive or possess such knowledge. But an agent for a carrier may act for himself, a coachman may carry parcels for which he is paid personally and does not account to his employer. In such a case he is not liable unless the owner of the goods supposed the coachman carried them for his employer, and was justified by his conduct in thus believing.

16. The common law relating to carriers has been greatly changed by federal legislation. By the interstate commerce act of 1887 and amendments the attempt was made to secure just rates, prohibit unjust discrimination, prevent undue preference, prohibit greater compensation for a shorter than for a longer distance, and abolish discriminations. It also provided that all charges made for any services rendered, or to be rendered in the transportation of passengers or of property or in connection therewith, or for the receiving, delivering, storage or handling of such property shall be reasonable and just, and every unjust and unreasonable charge for such services was prohibited and declared to be unlawful in determining the reasonableness of rates. In conducting their business

carriers were subjected to two leading prohibitions, that their charges were not to be unjust or unreasonable nor were they unjustly to discriminate so as to give undue preference or advantage. Other changes have since been made by the Carmack amendment to the interstate commerce act. The effect of this is to render and hold the initial carrier engaged in interstate commerce and receiving property for transportation from a point in one state to a point in another state as having contracted for through carriage to the point of destination, using the lines of connecting carriers and its agents, and liable to the holder of the bill of lading for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of the hands of the initial carrier or not, and to prevent interstate carriers from exempting themselves from liability for the loss of property or damage thereto after it has passed into the hands of another carrier for transportation. Congress has the right to legislate on the liability of carriers engaged in interstate commerce and has done so, thereby superseding all the regulations of the states. By federal law, a common carrier cannot exempt himself from liability for his own negligence or that of his employee but the rigor of this rule may be modified by a fair, reasonable and just agreement with the shipper which does not include exemption from such negligence. The right to receive compensation commensurate with the risk involves the right to agree on rates proportionate with the value of the property transported. Again, an interstate carrier may by a

fair, open and reasonable agreement limit the amount recoverable by the shipper to an agreed value for the purpose of obtaining the lower of two or more rates proportioned to the amount of the risk. Such a limitation does not conflict with any sound principle of public policy.

17. If an express company's receipt for a package states that the property is accepted as merchandise only, and that the company will not be liable for the loss of jewelry unless the articles are enumerated in the receipt, and the package in fact contains jewelry, though this is not mentioned in the receipt, the company cannot be held liable for loss of the package, either as jewelry or as merchandise. Said the court in stating this principle: "It is reasonable that a carrier when called upon to transport such property should make a special acceptance and prescribe the conditions under which it is to be shipped. This right is not inconsistent with the rule that the carrier cannot exempt himself from liability for the negligence of himself or his employees. He is entitled to receive compensation proportionate to the risk, and to protect himself from fraud or imposition by reasonable rules and regulations."

The measure of damages for loss or injury to baggage is the actual value of the articles destroyed, also the damage to articles partly destroyed. No account however is to be taken of the deprivation of the use of the articles, nor the mental distress caused by their loss. The value is the fair market value of the property. The loser is not allowed to recover the

expense incurred in making search for his baggage, nor for the amount spent in purchasing other clothing and articles of immediate necessity.

18. A carrier of passengers is responsible for their baggage, though only to the extent of what is fairly and ordinarily carried. What this quantity may be must always remain an open question of fact, for determination by the jury in any legal controversy. There can be no precise and definite standard. A traveller on a long journey needs more baggage than one on a short journey, and a traveller to some places and for some purposes needs more baggage than for other places or for other purposes. The reason for the rule is to prevent the carrier from becoming liable by the fraud of a passenger, for this would be the case if he could carry merchandise as baggage, and thus make a carrier of passengers a carrier of goods without knowing it. He is also to deliver to each passenger his baggage at the end of the route, and is held liable should he deliver it to a wrong party, or on a forged order. Generally, a carrier of passengers by rail, steam, or stage carries the baggage of a passenger without receiving specific payment for the service. But the law considers a payment for this so far included in the payment of fare as to form a sufficient ground for the carrier's liability.

19. A carrier is liable only for goods or baggage delivered to him and placed under his care. Consequently, when a passenger keeps his baggage, or any part of it, in his own hands, or within his own control, instead of delivering it to the carrier, or to his

servant, he cannot recover for any loss or injury that may happen to it.

A carrier may stipulate that the shipper must give notice of any claim for loss or damage within a reasonable prescribed time. This stipulation controvenes no public policy, excuses no negligence, and is consistent with holding the carrier to the fullest measure of good faith and diligence.

20. Not infrequently carriers have a rule prescribing the maximum loss on baggage for which they will be responsible. By this rule it is generally declared that, for a trunk, valise, or other article, they will not be responsible for more than a fixed amount, unless the owner shall give notice of its contents at the time of delivering the same.

21. A carrier of passengers must receive all who offer, carry them over the whole route and at a proper speed, demand only a reasonable, or the usual compensation, notify them of any peculiar dangers, treat all alike unless the dangerous condition or misconduct of a passenger requires different attention, and behave toward all with civility, and employ competent persons for all duties. Should he fail in any of these particulars he would be responsible for the injury thereby caused.

There is a clear difference between the contracts of carriage by a railroad or steamboat company and by an innkeeper. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep, while the passenger submits to the rules

and directions of the carrier. Consequently "every servant of the carrier to transport the passenger safely . . . is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination." For every negligent or wilful act inflicted on the passenger by the servant the carrier must respond. But the inkeeper does not take the guest, nor does he surrender himself. A room is assigned to him, but he is free to use it. "The servants of the innkeeper are not placed in charge of the person of the guest, to direct, guide, and control his location and action, nor are they employed to perform any contract to insure his safety; but they are engaged in the execution of the agreement of the master to exercise ordinary care for the comfort and safety of the visitor." Consequently "when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts."[1]

22. A carrier of passengers is under a more limited liability than a carrier of goods. The reason is that he has not the same control over them that he has over goods. Nevertheless, the liability of a carrier for passengers is very great. No proof of care will excuse a carrier if he loses goods entrusted to him for transportation, but proof of the utmost care will excuse

[1] Clancy v. Barker, 131 Fed., 161, 165.

him for an injury happening to passengers. A carrier of passengers is liable for any injury to them unless he can show that he took all possible care in carrying them.

23. Many a passenger who has been injured through the negligence of the carrier has failed to recover because he himself was negligent. This principle is of the highest importance, and runs all through the law. Thus, a traveller on a highway must look both ways and listen for trains at the very time he is approaching a railroad crossing. To omit this plain duty without any explanation is contributory negligence which prevents him from recovering for an accident, even though the railroad was negligent.

This rule was applied not long since to a bicycle rider who was about to cross a street-railway track. The court declared that it was "an unbending rule to be observed at all times and under all circumstances."

24. A passenger who stands on a platform, or rides on the steps of a street car, when there is a seat or standing room on the inside, assumes all the risk incident to his position. But, if there is no room within, and he rides outside with the knowledge and consent of the conductor, he is entitled to the same care and protection as the other passengers from known and avoidable dangers.

If a carrier refuses to carry a passenger, the damages are limited to those which naturally follow as a proximate result of the breech of the contract. The carrier may be held responsible for discomfort, men-

tal distress, expenses and charges proximately resulting from the breach of the contract, whether the passenger is carried beyond his station, or is let off the train short of his destination. The damages for failure to stop a train at a station and take on a passenger are the cost of the ticket and inconvenience directly resulting from the negligent act. The passenger may also recover for the personal injury he has sustained as a result of not carrying him according to contract, and in some cases of willful neglect, punitive damages may be allowed.

25. Telegraph companies in the early history of telegraphy were declared to be common carriers, but while they as well as telephone companies must serve the public generally in good faith and impartially, they are not insurers of a correct transmission of messages given to them, as carriers are for carrying property entrusted to them. They are however carriers in some states by statute. Though the transmission and delivery of messages within the states are still governed by state laws, interstate messages, so the supreme court of the United States has recently declared, are governed by the federal act of 1910 regulating commerce.

26. If the message be illegible an operator may refuse it, but, if received, he must read it as well as he can, and send it accordingly. He must not amend in any way, though it may be wholly unintelligible to him, for it may be understood by sender and receiver; he must, therefore, send the message literally, as written.

A delivery of a message to one of the company's messenger boys, written on one of its blanks, is not a delivery to the company until it has been accepted by it at one of the transmitting offices, for the boy is in law the agent of the sender.

27. Secrecy is also another obligation. Employees are strictly forbidden by statute or common law from making the contents of messages known. Even if they are summoned as witnesses in courts of justice, they are protected from producing despatches or testifying to their contents.

28. Messages must be delivered promptly and to the right person. A company is also bound to send beyond its own line if this is obviously required by the address of the message.

29. Whether the company is liable for the failure of another line to do its duty depends on the sender's contract made with the receiver. Several lines may be so associated as to be liable as partners. In other cases a telegraph company may agree, like a common carrier of freight, to transmit the message to the next company, but without holding itself responsible for its negligence in further transmission and delivery.

Professor Parsons says the question finally takes this form: "Has the receiving line, by actual connection with other lines, by an apeparance of connection sanctioned by the receiving line, by custom, or advertisement, or otherwise, led their customer to believe, or justified him in believing, that they will send the message over the whole distance as over their own lines? Receiving pay for the whole distance may be

prima facie evidence of such a contract, but it would be open to explanation."

30. The conditions printed on the face or reverse of a blank message become a part of the contract for transmission. In this way a company may make all reasonable rules for the receiving, transmission, and delivery of its messages. It may require prepayment of them. It may also require repetition, in order to be responsible. This is a common rule among telegraph companies, and is declared to be reasonable and binding on the sender or receiver of the message. Says Chief Justice Chapman, in one of the cases: "it seems to us that one who elects to save the small sum charged for a more extended liability cannot reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes, and that this principle applies to every stage of dealing with the message." [1] In Illinois the Supreme Court has taken precisely the opposite view, declaring that a message thus sent was a forced contract, unjust in conception, without consideration, and void.

The rule that messages must be repeated in order to hold the transmitter liable, has become the prevailing one; and by federal law telegraph and telephone companies are within the exclusive jurisdiction of the Interstate Commerce Commission for all interstate messages.[2] Their regulations however may be reviewed by the courts. Messages between points in the state passing in transmission through another state are regarded as interstate, and under the control of the

[1] Grinnell v. Western Union Tel. Co., 112 Mass., 71.
[2] Roberts' Fed. Liabilities of Carriers, vol. I, pp. 245-256.

Commission. But messages transmitted entirely within a state are outside their control.

31. Of course, a company in all cases must use reasonable skill in transmitting and delivering its messages. The above rule does not protect a company against the gross neglect or indifference of its operators. Should the addressee live several miles from the place to which a message is addressed, the company is under no legal duty to deliver it there.

Stipulations concerning night messages does not exonerate the company for any negligence in transmission, or exempt it from liability arising from the want of due diligence in prompt delivery. The company must exercise the same diligence in delivering them on the following morning as if they had been sent as day messages. A stipulation though to the effect that, in consideration of reduced rates, the company's duty to deliver shall be fulfilled by noon of the succeeding day is reasonable and valid.

Is a delivery to a hotel clerk of a message addressed to one of its guests or boarders in his absence a good delivery? The courts have answered both ways, but in one of the latest cases the court said: "We can see no reason why such a duty would exist, if voluntarily assumed, any more than that of receiving other notices or transacting other business for the boarder." [1]

32. To whom does a company give credit for the price of sending a message? The answer is, in the first place, to the sender. If sent without payment

[1] 98 Ind. 506.

the receiver may take it or not, as he pleases; if he refuses he cannot be held liable for the amount. But, if he takes an unpaid message, he must pay therefor. Finally, after receiving and opening the envelope containing a message, and especially after reading it, he cannot then decline to receive it and to pay for it, for he has received it.

The damages recoverable for a breech of the contract between a telegraph company and the sender of a message are those which may fairly and reasonably be considered to arise naturally from the breech of the contract, or such as may reasonably be supposed to have been in the minds of both parties at the time of making the contract.

33. The business of supplying the public with electricity, like that of supplying gas for lighting, involves the handling of a highly dangerous agent, and therefore requires a corresponding degree of care on the part of the undertaker to prevent injury. He must put his wires high enough to enable persons who are rightfully under them to pass without coming in contact with them, and to keep them properly insulated. One who lets the use of a structure, for example, a telegraph pole, for attaching electric wires thereto, is liable for defects whereby the electricity is caused to escape from a wire and injuring a third person.

34. Telephone companies, like telegraph companies, are analagous to common carriers in affording equal facilities to all, and may be compelled by law to furnish facilities to one offering to comply with their

regulations, even though such party is a rival company. A telephone company doing a general telephone business is a common carrier of news, and must furnish impartial service without discrimination to all persons in the same class. The cases hold a telephone company, like a telegraph company, to be a common carrier of news intelligence or communications. The interstate commerce act makes a telephone company, doing an interstate telephone business, a common carrier within the meaning and purpose of that act.

35. A telephone company must furnish its services to each patron at a uniform price for the same services. They are often regulated by statutes. It may make a greater charge to a subscriber who has a single line than to one who is on a party line. The charges for a long distance telephone must be the same to all, whether the patron be a subscriber or not; nor can the company do the business over a longer route and charge accordingly when it could be done over a shorter one.

36. One of the duties of a telephone company, with few exceptions, is to transmit all messages tendered to them in the order they are received. In many states this is a statutory requirement. A subscriber may demand that his "calls" at the exchange receive proper attention in the regular order in which they are made; that all calls for him be properly looked after; and that he be given prompt and efficient connections with other subscribers.

37. Under some circumstances, a telephone com-

pany may decline to serve an applicant. If he should use abusive language over the wires, or such as would tend to create a public disturbance, they may refuse to furnish him service while using such language. And should one of their subscribers use, continuously, such language or abuse over his telephone, after persistent requests by the company not to do so, they may, as a last resort, remove their instrument from his premises.

CHAPTER XV

PROMISSORY NOTES AND BILLS OF EXCHANGE

1. What is a negotiable bill or note.
2. Its four characteristics.
3. Non-negotiable paper.
4. Promissory note defined.
5. Must be delivered.
6. How it must be signed.
7. Forged signature.
8. Ambiguities and omissions.
9. Effect of additional statements.
10. Ways of payment.
11. Instrument need not follow language of the act.
12. Consideration.
13. Who is an accommodation party.
14. Indorsement.
15. Liability of an indorser.
16. Indorsement to an official.
17. How an agent or representative may indorse.
18. When is an indorsement presumed to have been made.
19. Holder may strike out indorsements.
20. Transfer without indorsement.
21. Instrument may be negotiated back.

22. Who is holder in due course.
23. Who is not such a holder.
24. What is notice of an infirmity.
25. How payment may be enforced.
26. Defences.
27. Admissions by parties.
28. Construction of act on this subject.
29. Indorsement by a third person.
30. Presentment.
31. How it must be made.
32. Place of presentment.
33. Mode of presenting it.
34. Presentment at bank.
35. Death of presentee.
36. Presentment to partners.
37. When presentment is not required.
38. When presentment is excused.
39. Dishonor of instrument.
40. Grace.
41. Presentment at bank.
42. When payment is in due course.
43. Notice of dishonor.
44. To whom benefit of notice enures.
45. Who may give notice.
46. How signed.
47. May be oral or in writing.
48. To whom notice must be given.
49. Use of post-office in sending notice.
50. Notification of antecedent parties.
51. Bill of exchange defined.
52. Acceptance defined.

53. Holder may require acceptance to be written on the bill.
54. Effect of writing it on another paper.
55. An incomplete bill may be accepted.
56. What is an actual acceptance.
57. Time for deciding whether to accept or not.
58. An acceptance may be general or qualified.
59. Holder may refuse qualified acceptance.
60. What bills must be presented for acceptance, and to whom.
61. When this presentment must be made.
62. When presentment is excused.
63. Dishonor of bill.
64. Foreign bill.
65. Protest.
66. Who may make protest.
67. When it must be made.
68. Where it must be protested.
69. A bill protested for non-acceptance can be protested for non-payment.
70. Protest of bill accepted by insolvent acceptor.
71. When protest may be dispensed with.
72. Protest of bill lost or detained.
73. Acceptance for honour.
74. Must be in writing.
75. For whose honour is an acceptance made.
76. To whom acceptor for honour is liable.
77. Nature of his engagement.
78. Acceptance of bill payable after sight.
79. When protest of dishonoured bill accepted for honour must be protested.

80. How presentment for payment to acceptor for honour must be made.
81. Protest of bill not paid by acceptor for honour.
82. Who may pay a bill protested for honour.
83. How such payment must be made.
84. Payment by two or more persons for honour of different parties.
85. Effect of paying bill for honour and rights of those who pay.
86. Recourse of holder who refuses to receive payment.
87. Payor for honour is entitled to receive the bill.
88. Bills in a set.

1. Notes, bills of exchange, checks, and other instruments are daily given by persons for various purposes. The most general division of them is into two classes—negotiable and non-negotiable. A negotiable instrument can be transferred by indorsement or delivery; a non-negotiable one can be transferred only by an assignment. Formerly, the transfer of notes was forbidden as a protection to the persons who made them. But this barrier was removed, first, from bills of exchange and afterward from promissory notes. Whenever, therefore, these instruments are so drawn that they can be transferred by indorsing and delivering them to the transferee or purchaser, or by delivery only, they are negotiable.

2. A negotiable instrument possesses four characteristics. The first is that it can be so effectively transferred by the original holder or owner that the trans-

feree can sue in his own name the maker or subsequent promissor for the fulfilment of his promise, should he fail to observe it. Second, should the instrument be stolen and transferred by a thief to another for a valuable consideration in the usual course of business and before maturity, the purchaser would acquire a perfect title, which he could not thus acquire to a horse or any other thing. Third, the holder of a negotiable note is entitled to the full amount mentioned on its face, and a defence which the maker could have made against the payee, had he kept it, will not avail against a later holder who acquired it in the usual course of business and before its maturity. Fourth, a negotiable instrument imports a consideration, like a sealed instrument. Between the immediate parties the truth may be shown, but not between others.

3. Notes and bills that are not negotiable are in common use. They can be transferred, but the transferee or holder is not so perfectly protected as the holder of a negotiable note or bill. The maker can always defend as effectively against a subsequent holder as against the original holder. "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

4. The three kinds of negotiable paper that are best known in the commercial world are promissory notes, bills of exchange, and bank checks.

Negotiable promissory note, within the meaning of the negotiable instruments law, is an unconditional

promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. And if a note is drawn to the maker's own order, it is not complete until indorsed by him. The sum is certain within the meaning of the law if it is to be paid with interest, by stated installments, with exchange or with costs of collection or an attorney's fee in case payment is not made at maturity. The instrument is also payable at a determinable future time, which is payable at a fixed period after date or sight, or on or before a fixed or determinable future time specified therein, or on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, nor does the happening of the event cure the defect.

5. To make the contract complete the instrument must be delivered. Until this is done it is revocable. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery by all prior to him is conclusively presumed. An in-

complete instrument that has not been delivered will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery.

6. How shall a negotiable instrument be signed? One who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. The signature may be made by a duly authorized agent, nor is any particular form of appointment needful for this purpose. And when one signs for another he is not liable if he was duly authorized. But the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

7. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

8. Where the language of the instrument is ambiguous or there are omissions, the following rules of construction apply: 1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are

ambiguous or uncertain, reference may be had to the figures to fix the amount. 2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof. 3. Where the instrument is not dated it will be considered to be dated as of the time it was issued. 4. Where there is a conflict between the written and printed provisions of the instrument the written provisions prevail. 5. Where the instrument is so ambiguout that there is doubt whether it is a bill or note, the holder may treat it as either at his election.

9. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable, except in some cases Thus its negotiability is not affected by a clause authorising the sale of collateral securities or confession of judgment if the instrument is not paid at maturity, nor by a clause waiving the benefit of any law intended for the protection of the obligor or maker, nor a clause giving the holder an election to require something to be done in lieu of payment of money. But a note which contains a clause authorising a confession of judgment at any time thereafter, whether due or not, is not negotiable. Again, the negotiable character of an instrument is not affected by the fact that it is not dated, does not specify the value given, or the place where it was drawn or is payable, or bears a seal, or designates a particular kind of current money in which payment is to be made.

10. An instrument may be payable in one of several ways. It is payable on demand when thus expressed, or at sight or on presentation, or when no time for payment is expressed. Likewise an overdue instrument is payable on demand so far as the issuer, acceptor or indorser is concerned. An instrument is payable to order where it is drawn payable to the order of a specified person, or to him, or to his order. And an instrument is payable to bearer when thus expressed or to a person named therein or bearer, or when it is payable to the order of a fictitious or non-existing person, which was known to the person making it so payable, or when the name of the payee does not purport to be the name of any person, or when the only or last indorsement is in blank.

11. The instrument need not follow the language of the act, but any terms are sufficient which clearly indicate an intention to conform to it. And where an instrument is expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert the true date of issue or acceptance. And where blanks have not been filled the person in possession has a prima facie authority to fill them.

12. The consideration required in every negotiable instrument is deemed prima facie to have been valuable, and every person whose signature appears thereon to have become a party for value. Likewise an antecedent or pre-existing debt constitutes value whether the instrument is payable on demand or at

a future time. And where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. Again, absence or failure of consideration is a matter of defense as against any person who is not a holder in due course. And partial failure of consideration is a defense to that extent.

13. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to another person. He is liable to a holder for value, notwithstanding he knew at the time of taking the instrument how the accommodation signer signed it.

14. By negotiation is meant the transfer of an instrument from one person to another in such a way as to constitute the transferee the holder. This is done if payable to bearer by delivery, if payable to order by the holder's indorsement and delivery. The indorsement must be written on the instrument or on a paper attached to it, and may consist of the indorser's name without any additional words. But an indorsement which transfers a part only of the amount payable, or transfers the instrument to two or more indorsees severally, does not operate to negotiate the instrument. If an instrument, however, has been partly paid, it may be indorsed for the residue. An indorsement may be either special or in blank, restrictive or qualified, or conditional

15. Where a person, not otherwise a party to an in-

strument, who places thereon his signature in blank, before delivery, he is liable as indorser in accordance with the following rules:

If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

Every person negotiating an instrument by delivery or by a qualified indorsement warrants: That the instrument is genuine and in all respects what it purports to be; that he has a good title to it; that all prior parties had capacity to contract; that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only the warranty extends in favour of no holder other than the immediate transferee.

Every indorser who indorses without qualification warrants to all subsequent holders in due course: The matters and things mentioned in sub-divisions one, two, and three of the next preceding section; and, that the instrument is, at the time of his endorsement, valid and subsisting.

And, in addition, he engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonoured and the necessary proceedings on dishonour be duly taken he will pay the amount thereof to the

holder or to any subsequent indorser who may be compelled to pay it.

16. An instrument that is drawn or indorsed to a person as "cashier," or other fiscal officer of a bank or corporation, is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiable by the endorsement of either party. And where the name of a payee or indorsee is wrongly designated or mispelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

17. Any person who is under obligation to indorse in a representative capacity, may indorse in such terms as to negative personal liability.

18. Every negotiation is deemed, prima facie, to have been effected before the instrument was overdue, except where an indorsement bears date after the maturity of the instrument. Every indorsement is also presumed, prima facie, to have been made at the place where the instrument is dated. Again an instrument, negotiable in its origin, continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

19. The holder may at any time strike out any indorsement which is not necessary to his title. By so doing he relieves from liability such indorser and also all indorsers, if there are any, who indorsed subsequently.

20. The holder of an instrument, who transfers it for value without indorsing it, vests in the transferee such title as the transferer had therein; and the trans-

feree acquires, in addition, the right to have the indorsement of the transferer; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

21. An instrument may be negotiated back to a prior party who may, subject to the law, reissue and further negotiate it. When this is done he is not entitled to enforce payment against any intervening party to whom he was personally liable.

22. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Who is a holder in due course? This question has arisen more frequently than any other in administering the Negotiable Instruments Law. On one occasion the drawer of a check gave it to another to be delivered to a third party in payment of the drawer's debt, but he fraudulently handed it to the payee in payment of a debt due from himself. The payee accepted it in good faith in payment of the debt. He was therefore regarded as a bona fide purchaser for value, and the drawer could not set up the fraud in defense of the check, nor maintain an action against

him to recover it.[1] In another case a person purchased a note for $1,000 three months before maturity knowing the maker to be solvent, for $500 without knowledge of any infirmity. He was entitled to recover thereon, though the consideration from the payee to the maker had failed.[2] In another case a note had been indorsed by the payee to another and by three successive holders before it was acquired by the plaintiff. The indorser to the plaintiff was a bona fide holder of the note and transferred it for value after maturity. The defence of fraud though available as between the original parties could not avail against the plaintiff.[3]

The payee was a holder in due course by the common law. This view is still generally maintained in applying the negotiable instruments law. But a number of important jurisdictions maintain the opposite view. An elaborate presentation of all the cases is given by Brannan. An amendment to the law is clearly needed to remove this defect.

23. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Where the transferee receives notice of any infirmity in the instrument, or defect in the title of the person negotiating the same, before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

24. To constitute notice of an infirmity in the in-

[1] Boston Steel & Iron Co. v. Steurer, 183 Mass., 140.
[2] McNamara v. Jose, 28 Wash., 461.
[3] Jennings v. Carlucci, 87 N. Y. Supp., 475.

strument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such fact that his action in taking the instrument amounted to bad faith.[1]

In construing this section the person to whom a note is negotiated must have actual knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounts to bad faith; one therefore who has knowledge of a defect in his transferrer's title, or knowledge of such facts that his action in taking the instrument amounts to bad faith, is not a holder in due course.[2] Again, mere suspicion of a defect in the title, or knowledge of circumstances that would excite such suspicion in the mind of a prudent man, or gross negligence of the taker at the time of the transfer, or an indorsement thereon describing the receipt of money from one of the makers who, released from further payment, would not defeat the assignee's title.[3]

On another occasion two certificates of deposit were drawn payable, one to "C, trustee," and the other to "C, trustee of B. F." At the time they were wrongfully indorsed by the trustee in the same form one of them had almost twelve months, and the other six months to run before maturity. They gave actual notice, so the court held, to the indorsee, that they represented a trust fund and obligated him to inquire into the right of the trustee to dispose of them.[4]

[1] M. Grok's Sons v. Schneider, 34 N. Y. Misc., 195.
[2] Keene v. Behan, 40 Wash., 505.
[3] Valley Sav. Bank v. Mercer, 97 Md., 458.
[4] Ford v. H. C. Brown & Co., 114 Tenn., 467.

25. A holder in due course holds the instrument free from any defect of title of prior parties and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

26. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable; but a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. Every holder is deemed, prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favour of a party who became bound on the instrument prior to the acquisition of such defective title.

27. The maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

The drawer, by drawing this instrument, admits the existence of the payee, and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that, if it be dishonoured, and the

necessary proceedings or dishonour be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits: 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and, 2. The existence of the payee and his then capacity to indorse.

A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

28. In construing the above section one who signs his name on the back of a note prior to delivery is an indorser.[1] And the fact that persons signing their names in blank on the note of a corporation were respectively president and secretary, and as such executed it on its behalf, did not enlarge their individual liability, which was that of indorser only, who could not be held on presentment, demand and notice of nonpayment by the owner.[2]

29. A person, not otherwise a party to an instrument, who places thereon his signature in blank before delivery, is liable as indorser, in accordance with the following rules: If the instrument is payable to

[1] Bank of Montpelier v. Montpelier Lumber Co., 102 Pac., 685.
[2] Luckenback v. McDonald, 95 C. C. A. 604.

the order of a third person, he is liable to the payee and to all subsequent parties. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. And, lastly, if he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

30. Presentment is not necessary in order to charge the person primarily liable on the instrument, but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Where the instrument is not payable on demand presentment must be made on the day it falls due. Where it is payable on demand presentment must be made within a reasonable time after its issue, except that, in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

31. Presentment for payment to be sufficient must be made:

1. By the holder or by some person authorised to receive payment on his behalf.

2. At a reasonable hour on a business day.

3. At a proper place, as herein defined.

4. To the person primarily liable on the instrument or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

32. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented.

3. Where no place of payment is specified, and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment.

4. In any other case, if presented to the person to make payment, wherever he can be found, or if presented at his last known place of business or residence.

33. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

34. Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

35. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

Notwithstanding the death of the maker, notice of dishonour must be given to the indorser.

36. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

37. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawer or acceptor will pay the instrument.

Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

38. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Presentment for payment is dispensed with: 1. Where after the exercise of reasonable diligence presentment as required by the act cannot be made; where the drawer is a fictitious person; by waiver of presentment, express or implied.

39. The instrument is dishonoured by non-payment when: 1. It is duly presented for payment, and payment is refused or cannot be obtained; or, 2. Pre-

sentment is excused and the instrument is overdue and unpaid.

Subject to the provisions of this act, when the instrument is dishonoured by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

40. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon, on Saturday, when that entire day is not a holiday.

Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

41. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

42. Payment is made in due course when it is made at or after the maturity of the instrument, to the holder thereof, in good faith, and without notice that his title is defective.

43. When a negotiable instrument has been dishonoured by non-acceptance or non-payment, notice of dishonour must be given to the drawer and to each in-

dorser, and any drawer or indorser to whom such notice is not given is discharged.

The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given.

Notice of dishonour may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

44. Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. And where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom such notice is given.

45. Where the instrument has been dishonoured in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

46. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescrip-

tion of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

47. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonoured by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

48. Notice of dishonour may be given either to the party himself or to his agent in that behalf. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

49. Where the person giving, and the person to receive notice resides in the same place, notice must be given within the following times: If given at the

place of business of the person to receive notice, it must be given before the close of business hours on the day following. If given at his residence it must be given before the usual hours of rest on the day following. If sent by mail it must be deposited in the post-office in time to reach him in usual course on the day following.

Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times: If sent by mail it must be deposited in the post-office in time to go by mail the day following the day of dishonour, or, if there be no mail at a convenient hour on that day, by the next mail thereafter. If given otherwise than through the post-office, then within the time that notice would have been received, in due course of mail, if it had been deposited in the post-office within the time specified in the last sub-division.

50. Where a party receives notice of dishonour, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonour.

51. Bills of exchange will next be considered. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

52. The acceptance of a bill is the signification by the drawee to the order of the drawer. The accept-

ance must be in writing, and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

53. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonoured.

54. Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favour of a person to whom it is shown, and who, on the faith thereof, receives the bill for value.

55. A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment. But when a bill, payable after sight, is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

56. An unconditional promise in writing to accept a bill, before it is drawn, is deemed an actual acceptance in favour of every person who, upon the faith thereof, receives the bill for value.

Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

57. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation.

58. An acceptance is either general or qualified. A general acceptance, assents, without qualification, to the order of the drawer. A qualified acceptance, in express terms, varies the effect of the bill as drawn.

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere.

An acceptance is qualified which is: Conditional—that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated. Partial—that is to say, an acceptance to pay part only of the amount for which the bill is drawn. Local—that is to say, an acceptance to pay only at a particular place. Qualified—as to time. The acceptance of some one or more of the drawees, but not of all.

59. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonoured by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorised the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notices of a qualified acceptance he must, within a reasonable time, express his dissent

to the holder, or he will be deemed to have assented thereto.

60. Presentment for acceptance must be made: Where the bill is payable after sight or, in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or, where the bill expressly stipulates that it shall be presented for acceptance; or, where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.[1]

61. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawer or some person authorised to accept or refuse acceptance on his behalf; and, where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

Where drawee is dead presentment may be made to his personal representative.

Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or his trustee or assignee.

When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock

[1] "Except as [above] provided, the holder of a bill which is required to be presented for acceptance, must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged."

noon, on that day. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment by the law. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

62. Presentment for acceptance is excused, and a bill may be treated as dishonoured by non-acceptance, in either of the following cases: Where after the exercise of reasonable diligence, presentment cannot be made; where the drawee is dead or has absconded, or is a fictitious person, or a person not having capacity to contract by bill; where, although presentment has been irregular, acceptance has been refused on some other ground.

63. A bill is dishonoured by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or,

2. When presentment for acceptance is excused, and the bill is not accepted.

Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonoured by non-acceptance, or he loses the right of recourse against the drawer and indorsers.

When a bill is dishonoured by non-acceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

64. Where a foreign bill, appearing on its face to

be such, is dishonoured by non-acceptance it must be duly protested for non-acceptance; and where such a bill, which has not previously been dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill protest thereof in case of dishonour is unnecessary.

65. The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.

2. The fact that presentment was made, and the manner thereof.

3. The cause or reason for protesting the bill.

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

66. Protest may be made by:

1. A notary public; or,

2. By any respectable resident of the place where the bill is dishonoured, in the presence of two or more credible witnesses.

67. When a bill is protested such protest must be made on the day of its dishonour, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

68. A bill must be protested at the place where it is dishonoured, except that when a bill, drawn pay-

able at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

69. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

70. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

71. Protest is dispensed with by any circumstances which would dispense with notice of dishonour. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

72. When a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

73. Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill, *supra* protest, for the honour of any party liable

thereon, or for the honour of the person for whose account the bill is drawn. The acceptance for honour may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honour for one party there may be a further acceptance by a different person for the honour of another party.

74. An acceptance for honour, *supra* protest, must be in writing, and indicate that it is an acceptance for honour, and must be signed by the acceptor for honour.

75. Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

76. The acceptor for honour is liable to the holder, and to all parties to the bill subsequent to the party for whose honour he has accepted.

77. The acceptor for honour, by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided also, that it shall have been duly presented for payment and protested for non-payment, and notice of dishonour given to him.

78. Where a bill, payable after sight, is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

79. Where a dishonoured bill has been accepted for honour, *supra* protest, or contains a reference in case of need, it must be protested for non-payment

before it is presented for payment to the acceptor for honour or referee in case of need.

Presentment for payment to the acceptor for honour must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section forty-nine.

80. The provisions of section thirty-eight apply where there is delay in making presentment to the acceptor for honour or referee in case of need.

81. When the bill is dishonoured by the acceptor for honour it must be protested for non-payment by him.

82. Where a bill has been protested for non-payment, any person may intervene and pay it, *supra* protest, for the honour of any person liable thereon or for the honour of the person for whose account it was drawn.

83. The payment for honour, *supra* protest, in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension to it.

84. The notarial act of honour must be founded on a declaration made by the payor for honour or by his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

And where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

85. Where a bill has been paid for honour all parties subsequent to the party for whose honour it is paid are discharged, but the payor for honour is subrogated for, and succeeds to both the rights and duties of the holder, as regards the party for whose honour he pays, and all parties liable to the latter.

86. Where the holder of a bill refuses to receive payment, *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

87. The payor for honour on paying to the holder the amount of the bill, and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest.

88. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable

on the part he has himself indorsed, as if such parts were separate bills.

The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part, as if it were a separate bill.

When the acceptor of a bill, drawn in a set, pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Except as otherwise provided, where any one part of a bill, drawn in a set, is discharged by payment or otherwise, the whole bill is discharged.

CHAPTER XVI

BANK CHECKS

1. How a check should be signed.
2. Who, acting as a representative, can sign them.
3. The law presumes a check is given in payment of a debt.
4. When the giving of a check does not transfer a deposit the holder cannot sue the drawee for the amount.
5. Cases in which a check does transfer a deposit.
6. A drawer may stop payment of his check.
7. Drawer's death works a revocation.
8. Check is designed for immediate presentation.
9. It is not due until payment is demanded.
10. Drawee may refuse to pay if deposit is insufficient.
11. If drawer has no money the drawing of check is a fraud.
12. A bank cannot permit an agent to use his principal's money to discharge his own indebtedness.
13. A public deposit belongs to the proper official.
14. A bank is responsible to depositor for paying forged checks.
15. Nor can it recover the money from an innocent holder.
16. Payment on a forged indorsement does not prevent recovery by rightful owner.

17. Protest of checks on non-payment.
18. Consequences of not presenting a check in proper time for payment.
19. A check may be certified.
20. What this implies.
21. Cashier's authority to certify.
22. Certification of forged check.
23. Certification of insolvent drawer.
24. Effect of inquiry about certification.
25. Post-dated check.
26. Right to return checks by clearing-house banks.

1. A CHECK, as defined in the negotiable instruments act, is a bill of exchange drawn on a bank and payable on demand. Like every other instrument, a check must be properly signed. A check signed by an individual with the word, "Agent," "Treas," or other descriptive term has sometimes been regarded as his individual check. By the modern law the intention of the signer is the guiding star. If, therefore, this is his way of signing checks for his pirncipal, the courts will give due effect to his intention. When the mode of signing is ambiguous it may be shown by oral evidence whether the signer intended to bind himself or his principal, or company.

2. Again, who, acting in a representative capacity, can give checks? The president of a company is not authorised by virtue of his office to draw corporation checks; but authority may be granted him by charter, statute or usage. Nor can a partnership deposit be drawn on the check of an individual partner. But if

it should be thus drawn and applied to the use of the partnership, such action would afford protection to the partnership. Either of two executors or administrators can sign a check, but all who act as trustees must sign. A court of equity, though, should one of them abscond, could order a bank to pay a check drawn by the other trustee.

3. The law presumes that a check is given in payment of a debt or for cash, and is evidence of the fact whenever the drawer had funds in the drawee's possession. The law presumes that checks taken by a creditor from his debtor, which he has received from another, are accepted as conditional payment, and not as a satisfaction of the debt. And this presumption can be overthrown only by clearly showing that they were accepted as cash, or that an agreement existed to receive them as unconditional payment.

4. In nearly every state a bank on which a check is drawn is under no legal obligation *to the holder* to pay or accept it, whether the maker's funds are sufficient for this purpose or not. In four or five states the effect of giving of a check to a person is to transfer to him the amount of the maker's deposit therein specified, and the check holder can sue the bank for the amount whenever payment is declined. In all other states the holder of a check cannot recover from the bank on which it is drawn, before acceptance. In like manner the Negotiable Instruments Law provides that "a check of itself does not operate as an assignment of any part of the funds to the

credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." A bank should not delay long either to pay, or to accept, or to refuse payment. It is not right to keep a check for several days and then refuse to pay.

While this is the most general rule existing between banks and check holders, these institutions have well defined duties to perform for their customers, the drawers. Their orders must be observed; and if a bank should decline to pay a check drawn on a sufficient fund belonging to one of its depositors, without a justifiable reason for so doing, the institution would be liable for whatever injury the depositor sustained. For example, should a bank decline to pay a check supposing that the maker's deposit was insufficient, when in truth it was ample, the institution would be liable for the consequences of dishonouring his order, even though its conduct was founded on the mistaken calculation of a bookkeeper.

5. Though a check drawn in the ordinary form transfers no title to a bank deposit, it does effect a transfer whenever it is drawn for the whole amount due to the depositor. Then, indeed, the legal title is completely transferred on the delivery of the check even against the drawer, but if only a part is included in an order it will not have that effect unless it is accepted by the drawee. The reason is technical for this distinction which, indeed, does not everywhere exist.

6. A drawer may stop the payment of his check.

This is usually done by giving a notice to the bank on which the check is drawn. After receiving such a notice it can pay only at its peril.

7. The drawer's death works a revocation of his check, notwithstanding, should a bank pay his check afterward, without knowing of his end, the payment would be legal. Of course, in the states where a check operates as an assignment of the maker's deposit, his death is without any significance.

But wherever a statute authorises payment, notwithstanding the drawer's death, this can be done.

8. A check is designed for immediate presentation. The holder, therefore, should present it for payment as soon as he reasonably can, and if he does not the retention is at his own risk. The Negotiable Instruments Law declares that "a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by delay." Delay in presentation, however, does not discharge the drawer unless he has been injured. The rules established for making presentation should be observed; for where they are not the risk of the drawee's solvency is assumed by the payee.

9. A check is not considered due until payment is demanded, and in this regard differs from a bill of exchange or note, which is payable on a particular day. Consequently, the receiving of a check a few days after its date from the payee does not, like the receiving of an overdue bill, subject the holder to the objections that might have been raised by the

drawer against the payee. A delay of two or three days is not enough to put the receiver on inquiry concerning the consideration for which the check was given, nor subject him to defences that might exist between the drawer and payee. Yet a check may be retained so long after its date without presentation as to cast discredit thereon; and when a check is presented for payment in a discredited condition the drawee bank should not pay it, and if it does the check cannot be charged to the depositor's account. Again, as an overdue check is taken on the credit of the indorser, it is subject to the equities or defences that existed between the original parties.

10. A bank may refuse to pay a check of a customer whose deposit is insufficient to pay the full amount. In other words, the presenter cannot claim whatever there may be and retain his check for the balance. But if he is willing to surrender the check there is no reason why a bank should not pay him all it has belonging to the depositor. A bank that pays a check to a holder who has committed no fraud in presenting it, though the deposit was insufficient, cannot recover the amount from him, but must look to the drawer.

11. The drawing of a check on a bank in which the drawer has no funds is a fraud, both on the person to whom it is given and on the bank. And the holder is also guilty of fraud should he present it for payment, knowing the condition of the drawer's account.

12. A bank cannot knowingly permit an agent or

trustee to use trust money to discharge his individual indebtedness, and ought to refuse to honour his check diverting the trust money. Nor should it permit him to transfer trust money to his own account, for this is often a fatal step to its further misuse.

13. A deposit by a public officer belongs to his successor on his accession to office. A bank may withhold payment from rival officials or boards that claim the deposit, until the question is legally determined in an action brought by the bank or by the officials.

14. As a bank is presumed to know the signatures of its depositors, it cannot pay a forged check and charge the amount to the depositor's account. The principal exception to this rule is in the case of a check so negligently prepared that an alteration is easily made. The maker must use care in filling up his check; if negligent in this regard he can blame no one but himself.

15. Again, a bank that pays a forged check cannot recover the money from the payee when he is innocent. This may seem a hard rule, and is an exception to the general rule that money paid by mistake may be recovered. Both are innocent, one or the other must lose, but as the bank might, by greater vigilance have discovered the forgery, it must suffer. This rule applies only when the payee has not been negligent in any respect. When neither has been negligent, or both have been, the bank can recover the money.

16. In like manner payment by a bank of a check on a forged indorsement is no defence against a re-

covery by the rightful owner. Furthermore, an indorsement by a person bearing the same name as the payee, but not the real person, is a forgery, and payment to him will not excuse the bank from paying the true owner of the paper. In like manner each of several successive indorsers, who have advanced money on paper payable to order, though having no title thereto because the first indorsement was a forgery, can recover from his immediate indorser.

17. On refusal of payment, the holder should protest the check and notify the drawer as well as the indorsers, if there are any, whom he intends to hold for payment. If, however, the drawer has no funds in the bank at the time of drawing the check, presentment and notice are excused.

18. Nevertheless, the consequences of not presenting a check within the proper time and notifying the drawer if it is not paid, are not the same as the consequences to the drawer of a bill from the holder's neglect to present it at the proper time to the acceptor for payment. If this is not done by the holder of the bill the drawer is discharged. His liability is the same as that of an indorser. He promises to pay if the bill is properly presented to the acceptor and is not paid, and notice is given to him of the fact. But the drawer of a check is not discharged by neglect or delay to present it for payment, unless he has been injured by the holder's remissness. He still is liable, because he is the primary debtor, unless he can show that he has suffered by the delay. The law, though, presumes that in some way he has been injured, and, consequently,

the holder is obliged to prove that the drawer has not lost anything in order to recover the amount due.

19. Checks are frequently certified. In doing this the title to that portion of the makers's deposit specified therein is transferred to the holder, who thereafter is a depositor having the same rights as any other. The holder of such a check should present it promptly for payment, or he will sustain the loss should the bank fail; and if it should pay the amount of a certified check long afterward to the original depositor, supposing that the true owner had disappeared, though requiring a bond of indemnity from him, this would be an acknowledgment that it belonged to the other.

20. A certified check implies that it is drawn on sufficient funds in the drawee's possession, that they have been set apart for its payment, and that they will be thus applied on the presentation of the check for that purpose. "The certification is equivalent to an acceptance."[1] A distinction has been drawn between certification before and after delivery. The legal effect of the prior certification is to assure the party afterward receiving it that it is genuine and will be paid. The bank is bound as well as the drawer.[2] The legal effect of a subsequent certification on the holder's presentation is to render the bank an absolute debtor and to release the drawer and all indorsers.

21. A cashier is authorised to certify only those checks that are drawn in the usual manner. A bank would not, therefore, be liable on a certified check con-

[1] Neg. Inst. Law.

[2] The drawer's liability during the proper period for presenting the check is the same as if it had not been certified.

taining an unusual stipulation. But when a cashier or other employee of a bank is authorised to certify the checks of drawers having sufficient funds, his transgression of instructions will not relieve the bank from responsibility to an innocent holder.

Certification of a check before delivery does not alter the presumption that it was not received in absolute payment, but if the creditor, after receiving the check, instead of presenting it for payment, causes it to be certified by the bank, it becomes affective as payment and the debt will be discharged as if the creditor had drawn the money and delivered it back to the bank as a deposit. The holder of a check who procures it to be accepted or certified, thereby discharges the drawer and all indorsees.

22. A bank that certifies a forged check must pay for, as someone must lose by, the deceit; although unintentional, the bank in law must bear the loss.

23. A drawer who obtains a certification after he becomes insolvent commits a fraud, and the bank has a right to reclaim or countermand the payment of the check unless it has been previously transferred to an innocent holder.

24. Sometimes a bank is asked by a person who is about to take a certified check in payment of bonds or other property if it is good. The courts have not always regarded an affirmative answer in the same way. By some of them such an answer means that the signature is good and that the bank will be responsible for the amount certified. More generally the meaning is narrower, that the certification and also the maker's

signature are genuine, and that his account is good for the amount certified. But the answer is no warranty or insurance that the amount stated in the check is the original or true amount. Nor can a bank reasonably be held by such an answer for the amount actually inserted by the drawer, because it has no knowledge usually outside the check itself. As the inquirer usually believes that the answer to his inquiry covers the amount also, a second inquiry should therefore be made on this point in order to remove all doubt. When a check is certified, as is often done, at the drawer's request, the bank makes a record of it, and consequently is able to answer a subsequent inquiry concerning the amount certified correctly. But when a check is presented by anyone else for certification, although the bank makes a record of its act, all that it can tell in reply to a subsequent inquiry is that the amount represented by the check corresponds, or does not correspond with the amount certified. The excess of a raised certified check that is paid may be recovered by the bank unless it acted negligently in making payment.

25. Sometimes checks are post-dated—that is, on a later day than the one on which they were actually written. The object of thus dating them is to obtain delay in making payment, as the drawer simply undertakes to have the money in the drawee's possession on the day specified. A bank that pays an altered post-dated check before its true date cannot charge the amount against the drawer. In no case can a check that is paid before the time specified be charged to the drawer's account.

26. Sometimes a rule exists among clearing-house banks that checks received through the institution for payment may be examined and returned by a specified time. Wherever this rule exists entries of them made by the receiving bank previously to that time or cuts or other marks on the checks, will not prevent their return, nor operate as an acceptance or payment.

CHAPTER XVII

GUARANTY AND SURETY

1. Guaranty defined.
2. The promise must be to pay another's debt.
3. What language must be used to describe a guaranty.
4. It must be accepted.
5. The claim must be presented against the debtor before proceeding against the guarantor.
6. The limit of the guarantor's liability.
7. When he can revoke his guaranty.
8. Distinction between guarantor and surety.
9. Distinction is sometimes difficult to understand.
10. Surety ought to know the nature of his undertaking.
11. Creditor is not required to give surety notice of non-payment.
12. Note must be due before surety can give notice to collect.
13. Notice should be in writing.
14. When notice has been given creditor should not delay to collect.
15. If more time is given to debtor the surety is discharged.
16. Rights of parties to a security for the surety's benefit.
17. Liability of a surety incurred through an agent.
18. Tender of more than the money due.

1. A CONTRACT of guaranty is an acknowledgment or promise for another. An obligation is created to pay if the person who is guaranteed, called the principal, is unable to recover the money due from the debtor. He must, therefore, bring an action within a reasonable time after the maturity of his claim against the primary debtor, and duly prosecute it, except in cases wherein nothing could be recovered were the attempt made.[1]

2. By the statute of frauds a guaranty must be in writing. The promise to pay must be proved by clear and satisfactory evidence. But it is not always easy to decide whether a promise relating to the debt or liability of a third person is, or is not, such an one as the statute requires should be in writing. When the promisor's chief purpose is, not to be responsible for another, but to serve his own purpose, his promise need not be in writing, though the promise in form is to pay another's debt.

3. What language ought to be used to describe a guaranty? On one occasion Chief Justice Gibson declared that warranty and guaranty signified the same thing, "the one usually, but not always, denoting a covenant in a conveyance, and the other denoting a parol promise." "I hereby guarantee the payment of the within certificate," is a guaranty; so is the form, "I hereby guarantee payment of the within note without protest." But "for a consideration I hereby agree to become security for the faithful performance," etc., is a contract of surety. And an order directing a

[1] Forms of letters of credit see Vol. VI, Appendix, No. 21.

person to give the bearer goods to a specified amount on the subscriber's account would render the person who gave it liable as a principal, and not as a guarantor. A stipulation in an agreement for the sale of goods, that a part of the purchase money shall be paid in "good notes," is no guaranty of the solvency of their makers.

4. To become binding a guaranty must be accepted, and notice of acceptance must be given to the guarantor unless the act of guaranteeing is followed by an immediate acceptance. Likewise, a guarantor of future credit is entitled to notice from the party giving the credit that he has been accepted, unless the creditor's offer and the guarantor's acceptance are concurrent acts. But a direct promise to guarantee future indebtedness does not require an acceptance. For example, a guaranty of existing and future indebtedness, "unconditionally at all times," and a promise to sign a note for a purpose that is mentioned. Another guaranty of this character requiring no notice was thus expressed: "If A purchases a case of tobacco on credit, I agree to see the same paid in four months." And on another occasion the guarantor wrote: "Give A a little more time and I will see that you get your money."

5. The law implies the due prosecution of the claim against the debtor by the party holding the guaranty, and failure to collect of him before the prosecutor can call on the guarantor. In other words, before the creditor can enforce his guaranty he must show that he has exercised due diligence to obtain payment from

the principal. Whether he has been reasonably diligent or not is a question of fact that must be determined like any other whenever it arises.

6. A guarantor cannot be held for a larger amount or longer time than the original debtor. When his liability ceases so does that of his guarantor. Nor can his liability be extended in any manner without his consent.

7. Often, but not always, a guaranty can be revoked, unless it relates to an unfinished transaction. Nor can a guarantor do so when he has received a consideration for guaranteeing what he retains. But a person who has guaranteed the payment of goods to a specified amount, and, after a portion has been delivered, desires to revoke his guaranty for the remainder, can do so unless he has been paid for guaranteeing the entire amount. There may be cases in which he could not do this regardless of the consideration received. If a seller, for example, relying on a guaranty, had ordered goods specially, and was liable for them, he could insist on delivering them and require the guarantor to fulfil his contract.

8. The contract of suretyship is an original undertaking, and the person who guarantees or becomes a surety is called by that name, while the person for whose benefit the contract is made is called the principal. The surety is bound to the full extent of the principal's liability. The contract of a surety in one respect is similar to a guarantor's, but differs from that of an indorser. The latter undertakes to pay after he has received notice of a demand and non-

payment by the maker, while no demand and notice are required to hold a guarantor or surety. But a guarantor's liability does not become absolute until the creditor has exhausted legal means to collect of the debtor; while a creditor to whom one has become a surety is not obliged to resort to any legal means against the debtor, unless he is notified to so do by the surety, to establish his right to proceed against the surety himself. It is true that the creditor usually seeks first to collect of the debtor, but he may first proceed against the surety. Again, the creditor is always excused from proceeding against the debtor whenever nothing could be recovered from him, for the law does not require the prosecution of a useless action.

9. While there is a difference between the liability of a surety and that of a guarantor, it is not always easy to determine by the agreement which liability is assumed. On one occasion the owner of a judgment "guaranteed payment thereon in one year from date." He was regarded as a surety, and as the time of payment was extended without his consent he was discharged. On another occasion the indorsement on an order, "I hereby become security for C for the fulfillment of the within obligation," created a contract of suretyship. Again, by the following indorsement the signer was declared liable as a surety: "I hereby acknowledge to be security for the within amount of $5,000 unless satisfactorily paid by W. W." So were the following indorsements: "I will see the within note paid," "guarantee payment when due;" "agree to its

terms." The promise or contract of suretyship must be in writing to comply with the statute of frauds.

10. A surety ought to understand the nature of his undertaking. If he does not he cannot ask to be relieved should one who has signed by mistake a note as maker be subsequently released. Nor can a surety on a note be relieved from liability to the holder who has taken it for a valuable consideration by showing that his instructions relating to the completion of it were not followed; for as the surety has created confidence by putting the note, though incomplete, into the debtor's hands, he must suffer the loss that befalls an innocent party.

11. A creditor is not required to give notice to his surety of the non-payment of the note at its maturity, nor display any diligence in recovering from the debtor before proceeding against the surety himself. Consequently a surety is not discharged by the creditor's omission to bring an action against the principal debtor. But if a surety, or one properly authorised for him, gives his creditor a positive and clear direction to sue the principal debtor at a time when the debt can be collected, which is disregarded, the surety will be released.

12. The note or other obligation must be due before the notice can be given. A notice, therefore, by a surety on a note not yet due, that he will not remain responsible of the holder does not sue the principal debtor as soon as the debt becomes due, or that the holder must get another security, will not discharge the surety.

13. Formerly, the notice need not be in writing, though this was always regarded as better evidence, but in some states a statute has been enacted requiring a written notice.

14. A creditor who has been notified must not only begin his action against the principal immediately, or without any unnecessary delay, but must prosecute it with all reasonable diligence. So long as a creditor is not notified his silence can never affect his remedy against the surety. Mere forbearance or delay, however injurious to the surety, will not discharge him.

15. If, for a consideration, more time is given to the principal debtor to pay, without the surety's consent, who is thereby prevented from proceeding against the debtor, this discharges the surety. Often he escapes through the creditor's forgetfulness or disregard to obtain his acquiescence to an extension of the time of payment given to the debtor. Doubtless in most cases a surety would readily consent, but he is not asked, the extended time expires, the debtor does not pay, and the surety is released.

16. Having shown the nature of a surety's undertaking, and when he is discharged therefrom, we shall next consider the rights of parties to the security often given to secure a surety. And first, a security held by a principal who is paid by the surety passes to the latter for his protection. For example, a mortgage that has been given to a creditor as security who is paid by the surety, passes to him. Again, a creditor, even though he may not have known in the beginning of the security held by a surety for his indemnity, or

for the payment of his debt, is none the less entitled to this additional protection.

17. Sometimes the obligation of a surety is incurred by the request or solicitation of an agent. Whenever this is done, and the surety pays the debt for the principal's benefit, he is answerable to the surety. And if the secretary of an association has induced a person to become a surety on a note, it cannot repudiate the secretary's authority and yet retain the benefit of the act.

18. Should a party who has promised to pay money tender more than the whole debt, it would be generally valid, but the money must be tendered solely in discharge of the debt. If the object of the tender, besides discharging the debt, is to impose a liability on the creditor it is not valid. It has ever been held that the tender of a sum exceeding the debt, accompanied with the demand that the creditor shall make the change and return the balance, is in law no tender.

CHAPTER XVIII

PARTNERSHIP

1. What is a partnership.
2. Secret and dormant partners.
3. There may be more than one partnership name.
4. When a single joint transaction does not constitute one.
5. Effect of agreements between partners.
6. Persons who are not partners may be thus liable.
7. Intention and participation in the profits as a test of partnership.
8. Factors and brokers are not partners.
9. A firm may hold any kind of property.
10. Authority of a partner.
11. What a partner cannot do.
12. A partnership has no seal. Mode of conveying.
13. A partner's authority to bind his firm under seal.
14. They must act as partners to bind each other.
15. The receiving of a new member constitutes a new firm.
16. Money lent to a partner for a particular purpose is a partnership debt.
17. Money lent to a partner is presumed to be for partnership use.

18. Money lent on the credit of a single partner can be recovered only of him.
19. A partner is liable for the acts of his co-partner because he is a general agent.
20. A partnership is liable only to a creditor dealing in good faith.
21. When the firm is liable for the criminal acts of a partner.
22. But an illegal contract does not bind a partnership.
23. Mode of dissolving a partnership.
24. When a partner will be prevented from transferring his interest.
25. Effect of death of a partner.
26. Effect of insanity or imprisonment.
27. When a firm is thus dissolved an account may be taken.
28. Sale of a partner's entire interest causes a dissolution.
29. Effect of the retirement of a partner.
30. He should give notice of his withdrawal.
31. A dormant or secret partner is not liable after his retirement.
32. Liability of a firm and partners for firm and individual debts.
33. Effect of dissolution.
34. The survivors are not partners.
35. Authority of a liquidating partner.
36. To whom payment should be made.
37. Authority of a partner to take the firm's property and pay its debts.
38. Limited partnerships.

1. A PARTNERSHIP is a combination of two or more persons of their property, labour or skill for the purpose of making a common profit. By the uniform partnership act a partnership is "an association of two or more persons to carry on as co-owners a business for profit." Frequently the word firm is used instead of partnership but in law the term partnership is the more common.[1]

Any persons who are competent to transact business on their own account may form a partnership. A minor may enter into a partnership agreement, but he may avoid liability to partnership creditors. He cannot however set up his disability to relieve himself of his firm's debts and retain possession of its assets. If a minor falsely represents that he was of age and forms a partnership with an adult, the latter may dissolve it and as between the two incur no liability. While a minor acts as a partner, he possesses the same power as any other. Again, no one but a minor can take advantage of his disability, for the disqualification is personal.

Alien friends may be partners, but if war breaks out between their respective countries they become alien enemies and the partnership is dissolved or suspended.

2. A secret partner is an actual participant in the profits of the concern, but is not avowed or known to be one. A dormant partner takes no part in, or control of the business. Even though creditors do not know of their connection with the firm at the time of giving credit, both are liable, if their partnership re-

[1] For form see Vol. VI, No. 20. For other forms relating to partnership matters, No. 30.

lation is discovered, on the ground of their interest and participation in the profits. But if the relationship was known at the time of their purchase, and credit was given only to the open partner, the other would not be liable. A nominal partner holds himself out to the world as one, when in truth he is not. He also is liable to creditors of the firm, for the reason that he justifies them in trusting the concern on his credit.

3. A partnership usually has only one business name, but there is no objection to the use of different names, especially for distinct business transactions. Thus, there may be a firm of A, B & C for general business, and A, C & Co. for buying and selling negotiable paper.

4. A single transaction of several persons from which neither profit nor loss arises, will not create a partnership. Nor will a purchase by them all if each party takes his distinct share. But persons may act as partners in a single transaction. On one occasion A chartered a vessel to take a cargo of flour from Philadelphia to Lisbon. A part of the flour belonged to A, a part to B, and the remainder to C, who was in Lisbon. It was sent to C and was marked as his property for the purpose of protecting it from British cruisers. Had the vessel reached Lisbon the flour would have been sold by C. The three were regarded as partners in the transaction. More generally, whenever there is an agreement to enter into business, or to do some particular thing, and to share the profits and losses, this constitutes a partnership. The partners may agree

to share the profits in whatever proportion they please; in the absence of an agreement it is presumed they are to share equally.

5. Partners may agree concerning the mode of dividing the losses, or that one or more of their number shall sustain them. An agreement of this kind is valid between them, but all are responsible to third parties, unless they knew of the agreement. More generally, stipulations in articles of co-partnership, limiting the power of a partner, are not binding on third parties who are ignorant of them. In other words, each partner is absolutely responsible to every creditor of all the debts of the firm. Business could not be safely done with a partnership were secret agreements between the members binding on others. Unless outsiders have knowledge of them, they are in no way affected by them.

6. Persons may be liable as partners to third parties who are not partners as between themselves. If by his speech or conduct B is led to believe by A that he is a partner in a firm, and thus believing a contract is made with A, to which the firm is a party, A is responsible, even though he is not a partner. Again, should he declare that he had an interest in the concern with others, or conducted the business of the partnership as a partner, accepted bills or suffered his name to be used on cards, or signs, or in advertisements, the law would regard him as a partner. The reason for this rule is plain. It is to prevent loss to which creditors would be exposed. The declarations or acts, however, of one person cannot make another

person liable as a partner without his co-operation or consent by word or act. Again, though one should hold himself out to the world as a partner when he really was not, he would not be responsible to a creditor who knew the truth.

7. What act may be regarded as establishing or tending to establish the partnership relation is not easily answered. Two persons, not partners, who nevertheless so act and speak as to lead the business men of the community in which they live thus to regard and trust them, the law considers as holding that relation. Therefore, should they purchase a stock of goods and agree to give their joint notes for them, and one partner in the other's absence should do so, his act would be strong evidence of a partnership, rendering both liable therefor. On one occasion a partner in a grocery store bought lumber on his account and gave a note signed in the firm's name, which the payee indorsed to L, who received it without any knowledge of the purpose for which it was given. Though the partner's conduct was a fraud, the firm was liable, but it would not have been had L known the nature of the transaction. Should two persons be sued as makers on a note signed by one, who is a member of a partnership, and the other should admit his liability, this would be evidence of the existence of a partnership.

There has been much discussion concerning the test of a partnership. Sometimes the courts have said that the true test was an interest in the profits and in the sharing of the losses. Both have been regarded

as essential to create a partnership relation. Of late the courts look more to the actual intention of the parties and their actual ownership of the funds of the partnership. One may think that this question can always be easily answered, but it cannot be. Thus, a clerk may receive in the way of compensation a share of the profits for his skill or other ability. In such cases is he to be regarded as a partner, or is this division of profits simply a mode of remunerating him? The courts have not always been uniform in deciding this question. In the later cases, especially, a clerk who is renumerated in this manner has not been regarded as a partner. Whenever a partnership fails, of course creditors are desirous of sweeping within the range of liability the greatest number of persons possible, and it is on such occasions that this question arises concerning the composition of a partnership. The uniform partnership act provides: "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: (a) as a debt by instalments or otherwise; (b) as wages of an employé or rent to a landlord; (c) or an annuity to a widow or representative of a deceased partner; (d) as interest on a loan though the amount of payment vary with the profits of the business; (e) as the consideration for the sale of the good will of a business or other property by instalments or otherwise."

8. Factors and brokers who do business for a commission on the profits, masters of vessels who engage

for a share of the profits, and seamen employed in the whale fishery, are not partners. The question relating to seamen engaged in whale fishing was decided many years ago, when that was an important industry. If there was a good catch then the profits might be very considerable; if unsuccessful, then the seamen received nothing besides their living and perhaps their outfit for their toil. The shares they received were called lays; in one sense the business was a kind of lottery, depending largely on unknown conditions.

9. A partnership usually may hold any kind of property; real estate as well as personal. It may be formed to buy and sell land, or cultivate it. Usually partnerships exist for the purpose of the production, or the purchase and sale of personal property. There are, however, land companies for the improvement and sale of land. The uniform partnership act declares that "all property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property. Unless the contrary intention appears, property acquired with partnership funds is partnership property."

10. The authority of a partner is very great. Every partner is a general agent of the partnership, having authority to bind all its members and property in transactions that relate to the usual business of the firm. His authority extends to the making or indorsing of negotiable paper, and to all transactions that are within the usual business of the firm. But the holder of an indorsed note or bill, who ought to have known

that the partner had no right to indorse it, has no claim against the partnership.

11. He cannot make a contract of guaranty or suretyship, or render his firm responsible for the debt of another. He cannot sign a letter of credit, nor submit a disputed claim to the decision of others, because these things do not belong generally and properly to commercial business. Of course, any acts of a partner may be adopted and ratified by his co-partners, and when they are, have the same force as if they had been originally authorised. Such ratification may be in a formal manner; or by doing things from which a ratification can be implied, especially receiving and retaining the results of such action; for example, taking and holding money resulting from a transaction.

The contemplated action of the majority may sometimes be restrained by the minority. A partner may stop a negotiation just begun, and prevent a bargain that would bind him, by giving notice to the party in season of his refusal. But a notice not given soon enough cannot prevent its completion, as such party ought not to suffer.

12. A partnership has no seal and can have none. Deeds and other instruments are sometimes executed, A, B & Co., with a seal added or affixed to the name. This, in truth, is no seal at all. But a seal to a deed given by a partnership has sometimes been declared to be the seal of each partner. As their intention in such cases is to make a good conveyance, the law in some states, perhaps, has been rather lax, declaring such in struments to be valid, notwithstanding their

obviously imperfect form. The correct mode of execution by every partner is to sign his name and add his seal.

13. Formerly a partner could not bind his co-partners by an instrument to which he had added a seal after his name, unless thereto authorised by a similar instrument. Even by acknowledging his authority afterward, the defect was not cured. Now, a partner may bind his firm by a sealed instrument executed in the firm name and pertaining to ordinary partnership business whenever his partners consent before its execution, or adopt and ratify it afterward. Furthermore, their consent or ratification may be by word as well as by seal.

14. Partners to bind each other must act as partners. Thus, a partner who should make a note and sign it in his own name and also his partner's name, would not bind his partner, for he has no authority to make such a note. His only mode of signing is the partnership name. If he signs as an individual he can be held as an individual; if he signs the name of another partner, without authority, the latter cannot be held liable thereon.

15. The receiving of a new member constitutes in law a new firm. It may recognise the old debts by agreement, or by paying interest, or in other ways. When this is done the new firm is liable for the old debts, but there must be some act from which the assent of the new member to become liable for the old debts may be inferred, otherwise he is not liable for them. Ordinarily, he would not think of doing such

a thing without receiving some kind of benefit. Consequently, the law protects him from liability unless he clearly has agreed or promised to pay them.

16. Money lent to a partner for partnership purposes is a partnership debt. Again, a partnership is responsible for money not used for partnership purposes, but borrowed under circumstances that justified the lender in supposing that it was to be thus used. And a partner who uses money that he has in his possession as a trustee for a partnership purpose with the knowledge of his partners renders the partnership liable therefor. Even though not knowing that the money was of this nature, if they were directly benefited by the transaction, they would be regarded as having authorised its use and consequently would be responsible.

17. Without evidence showing to whom the credit was given, the fact that money lent to a partner was applied to the use of his partnership concludes its liability.

18. A person who gives credit to a single partner can look only to him, although the money was applied for a partnership purpose; but a partner who declares that he is borrowing for the firm to which the lender gives credit, and the transaction is a fair one on the lender's part, renders his firm liable, although the money is wrongfully appropriated by the partner to his own use. The application of this principle has sometimes been severe on partnerships, but it is evidently just. It is one of the consequences of the authority possessed by a partner. If, on the other

hand, a partner was not authorised to borrow unless with the consent of his co-partner, then a firm would often be hampered in doing business. It seems necessary, therefore, for the successful transaction of partnership business, that each partner should have authority to borrow, notwithstanding the greater danger of abusing it by thus wrongfully using money borrowed on the credit of a partnership for an individual purpose. If someone must lose in such transactions surely the partnership that has given rise to the creation of such authority ought to be the loser, rather than an innocent person who may have trusted a member supposing that he had full authority to borrow money.

19. The ground of liability of a partner for the acts of others is that of a general agency for the transaction of all business within the scope of the partnership. The law of partnership is only a branch of the law of principal and agent. As an eminent jurist has remarked, the real ground of liability of a person as a partner is that the business has been carried on by persons acting for him.

By the uniform partnership act, "where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or committing to act."

20. A partnership is liable only to one who deals

with a partner in good faith. Thus, one who receives negotiable paper bearing the firm's name, knowing that it was not given in the business of the firm, and was without consideration, cannot hold the firm. And a creditor of a partner who should receive for his separate debt a partnership security, would be guilty of a fraud unless the partner had, or was supposed by the creditor to have, the authority of the rest.

21. Again, a partnership may be liable for an injury caused by the criminal or wrongful acts of a partner committed in transacting partnership business, and especially if the partnership gave to the wrong-doer the means and opportunity of wrong-doing. Thus, co-partners are liable for the fraudulent representations of a partner relating to partnership business, though having no knowledge of them at the time they were made, nor approving of his conduct in making them after it was known. Says an eminent jurist: "It has long been established that a partner is liable for the consequence of frauds practised by his co-partner in the transaction of the business of which he was entirely ignorant, and although he derived no benefit from the fraud. This is upon the ground that, by forming the connection, partners publish to the world their confidence in each other's integrity and good faith, and implicitly agree to be responsible for what they shall respectively do within the scope of their partnership business."

22. An illegal contract, however, made by a partner will not bind his partnership, for all the parties are supposed to know the law, that no bargain can be

enforced which is illegal. Thus, a partner who should borrow and agree to pay usurious interest, would not bind his partners by the transaction, for an agency or authority to an agent to violate a statute cannot be implied. Such an act is clearly illegal, and is not within the scope of a partner's authority.

One who knows that two firms with a common member are distinct, must use ordinary care to find out with which one he is dealing. But if the contract is apparently within the scope of business of the firm with which, in the exercise of reasonable care, he supposed himself dealing, all members of that firm are liable to him. If the common partner acts for both firms in making a contract, and in any manner defrauds one, as by using firm property of one to pay an individual debt to the other, the transaction is voidable.[1]

23. Next we may inquire concerning the mode of dissolving a partnership. When the agreement says nothing, it may be dissolved at the pleasure of either party. No partner, however, can exercise this power wantonly, to the injury of the other partners, without making himself responsible for the losses caused by his act. If there be an agreement, fixing a period for its existence, this is binding.

24. Should either partner attempt to transfer or assign his interest, for the purpose of withdrawing from the firm against the will of the others, and without good reason and contrary to his agreement, a court of law would prevent him from thus acting. For the

[1] Rowley on Partnership, § 420.

consequence of transferring his interest would be to dissolve the partnership, and surely he ought not to be permitted to do this without good reason. If, however, a proper reason exists he may transfer his interest. By so doing the person to whom his interest is transferred does not become a member of the firm.

25. The death of a general, or even special partner, causes a dissolution. His personal representatives, who are his executors or administrators, do not take his place unless the terms of the partnership state that they are to succeed him. There are various reasons why death should dissolve a partnership. First of all, when persons form a partnership they are supposed to know each other, their ability, means, etc., their general fitness to engage in the common enterprise, and it would be inexpedient for the law to permit others to take the place of a deceased member. It is true that a dissolution in case of death may work hardship, and perhaps loss to a partnership, by the withdrawal of the means, credit, and ability of the deceased member. That is one of the risks always taken in forming a partnership; but it is safer to regard a partnership as dissolved whenever a member dies than it would be as continuing.

26. If either party is unable to do his duty by reason of insanity or imprisonment, or is guilty of wrong-doing, a court will declare the firm to be dissolved; and if the original agreement was a fraud a court will also declare it void from the beginning.

27. Whenever a dissolution is thus decreed or declared an account will be taken by the partners, when

requested by any partner. Moreover, a court will order a sale of the effects and distribute the proceeds. Such a decree will also be made when a partner dies or becomes bankrupt.

28. The sale of the entire interest of a partner by order of the court, to pay his individual indebtedness, causes dissolution. A partner may owe a large sum of money outside the partnership for his individual transactions, and his interest in the partnership may be taken by creditors to satisfy their claims. This is by no means an infrequent thing. The dissolution thus caused may be, indeed, unfortunate for the other partners, but it is one of the risks of uniting in the undertaking.

29. The retirement of a partner also causes a dissolution. The law regards the remaining partners as a new firm, even though the name remains unchanged.

30. A retiring partner should give notice by public advertisement of his retirement. It is also said that he should give personal notice, by letter or otherwise, to all who usually do business with the firm. This is not the rule everywhere. After such a notice he is not responsible, even though his name is retained by the other partners in the firm without his consent. Nor is he responsible to anyone who has actual knowledge of his retirement.

31. A dormant or secret partner is not liable for a debt contracted after his retirement, although no notice has been given by him; for, as he is unknown and cannot add credit to the firm, his retirement does not affect his liability.

32. When the application of partnership assets are unaffected by prior disposition by the partners or by legal liens against them, "the general rule is that the assets of a firm are to be applied in the following manner: (1) in payment of the debts of the firm to persons who are not partners; (2) in payment to each partner ratably what is due from the firm to him for advances, as distinguished from capital put in; (3) in paying each partner ratably what is due from the firm to him in respect of capital; (4) the ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract." [1]

With respect to the payment of individual creditors the general rule is that firm creditors have a priority in firm assets, and creditors of individual partners a priority in their individual assets. Rowley says there has been much dissatisfaction with this rule, nevertheless it is the most general one, and has been incorporated in the partnership act.

33. Lastly may be considered the effects of dissolution. If caused by the death of a partner the whole property goes to the surviving partners, not, indeed, as their own, but only for the purpose of liquidating the indebtedness of the partnership. If they continue the business with the partnership funds they do so at their own risk, and the representatives of the deceased may require the return of the capital he invested and also his share of the profits.

34. The survivors are not partners, but simply

[1] Rowley on Partnership, § 534.

owners with the representatives of the deceased of the stock or property in their possession. After a dissolution no one has authority to make new contracts in the name of the firm, except as we have already mentioned, in the way of settling its affairs. It is a common thing to provide that on the dissolution of a partnership by mutual consent one partner shall settle the affairs of the concern, collect and pay its debts, and the like, but this will not prevent any person from paying a debt to any other partner due to the firm. If this is done in good faith his release or discharge is valid.

One of the most important changes made by the uniform partnership act relates to the liability of partners who continue the business after the retirement of a partner; or the admission of a new partner without liquidating the business. The act makes the creditors of the first or dissolved partnership also creditors of the partnership continuing the business. And "a person admitted as a partner into an existing partnership is liable for the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred except that this liability shall be satisfied out of partnership property." The effect of this obligation is to make the partnership property liable for the debts of the old firm.

35. A liquidating partner can do many things. He can give renewal notes, make indorsements, and collect money that is due to the concern. He can also revive a debt against the partnership that has become out-

lawed, because the owner has not collected it within the period fixed by law.

36. After transferring the assets of a firm to any partner or other person for the purpose of liquidating its debts, any debtor who had notice of this would be bound to make payment to such person; and if he paid anyone else he could be required to pay the money over again.

37. An agreement between a liquidating partner and his other partners, whereby he is to take all the property and pay all the debts, though valid between them, has no effect on the rights of third parties. They have a valid claim against the partners, of which they cannot be deprived without their consent. The consent of a creditor may be inferred, though not from slight evidence.

38. Lastly may be considered the subject of limited partnerships. These are the creation of statute and have been established in many states. A limited partnership may be formed for transacting agricultural, mercantile, mechanical, mining or manufacturing business. The partnership may consist of one or more persons who are called general partners, each of whom is responsible for all the debts. Besides general partners, other persons, called special partners, who are not liable for the debts of the partnership beyond the amount thus contributed by them, may contribute specific sums in actual money as capital. The general partners only are authorised to transact business and sign for the partnership. The persons forming such a partnership are required to make and sign a cer-

tificate containing the name under which the partnership is to be conducted, the general nature of the business, the names of all the general and special partners, and also the amount of capital contributed by each special partner, and the period for beginning and ending the partnership.

A special partner may sell or assign his interest with the assent of his partner in writing without causing a dissolution of the partnership. A general partner with the written assent of his partner may also sell and dispose of his interest in the partnership; or on his death his administrator may, in like manner, sell his interest for the benefit of his estate. A special partner from time to time may examine into the state and progress of the partnership and may advise concerning its management, but he cannot transact any business nor can he be employed as an agent or attorney. Furthermore, the law generally provides that interference in its affairs contrary to law renders him liable as a general partner. The capital of the partnership may be enlarged by increasing the membership of special partners, or by new subscriptions from the old ones.

The law in most states provides that the terms of the partnership must be recorded and published so that the public may have an exact knowledge of its nature; and all renewals or changes must have similar publicity. This is for the purpose of protecting the partners, as well as for the benefit of those doing business with the firm.